Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

Viveca Sanai, Cyrus Sanai, and Fredric Sanai,
Petitioners,

v.

Sassan Sanai, et. al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals err when it followed its existing published precedent which holds, contrary to every other federal and state appellate court to have considered the issue, that the "collateral bar doctrine" prohibits review of the merits of an order which is the subject of a subsequent criminal contempt conviction where the appellant had no prior opportunity for meaningful appellate review of such order?

2. Did the Ninth Circuit Court of Appeals err when it adopted the Third Circuit Court of Appeal's minority position that an order barring a federal court litigant from seeking relief in parallel state court proceedings is not a directly appealable order?

3. Did the Ninth Circuit Court of Appeals err when it applied its recent published precedent holding that the *Rooker-Feldman* doctrine forbids federal court lawsuits which affect ongoing state court proceedings that have neither concluded nor are ripe for review by this Court?

4. Did the Ninth Circuit Court of Appeals err when it held that *Younger* abstention bars a lawsuit under 42 U.S.C. §1983 seeking injunctive and declaratory relief against post-judgment state court proceedings conducted by a judicial official who is an employee of the opposing private party and who was a witness at the trial of the proceeding?

PARTIES TO THE CASE

This petition is from a single unpublished decision of the Ninth Circuit Court of Appeals which decided four appeals, two of which were consolidated, arising from four separate actions, two of which were consolidated.

The two consolidated appeals, 03-35797 and 03-35932 are from a district court proceeding which itself is the consolidation of a federal question lawsuit, CV-02-2165-TSZ and a diversity lawsuit, CV-02-2560TSZ. The plaintiffs in lawsuit CV-02-2165-TSZ are Viveca Sanai, Cyrus Sanai, Fredric Sanai, Ingrid Buron and Daria Sanai. The defendants in CV-02-2165-TSZ are Sassan Sanai, Mary McCullough, and Internal Medicine & Cardiology, Inc. The plaintiffs in CV-02-2560TSZ are Cyrus Sanai and Fredric Sanai. The defendants are Sassan Sanai, Mary McCullough, Internal Medicine & Cardiology, Inc., William Sullivan, and Marsh, Mundorf, Pratt, Sullivan & McKenzie.

Appeal 04-35041 is from the final judgment in action CV-03-02781-JCC. The plaintiffs in that case are Fredric Sanai and Viveca Sanai. The defendants are Geoffrey Crooks, Joseph Thibodeau, Anne Ellington, Martin Appelwick and William Baker.

Appeal 04-35881 is from action CV-04-01594-TSZ. The plaintiffs in that case are Viveca Sanai, Cyrus Sanai and Fredric Sanai. The defendants are Sassan Sanai, Mary McCullough, Philip Maxeiner, William Sullivan, and Marsh, Mundorf, Pratt, Sullivan & McKenzie.

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PETITION FOR A WRIT OF CERTIORARI

This case presents three different legal questions concerning federal procedural and jurisdictional law that have been the subject of multiple decisions by this Court and the federal appellate courts. On these three questions the Ninth Circuit Court of Appeals' published decisional law breaks with the law of other circuits. In addition, this petition presents a fourth question that does not present a circuit conflict as much as the Ninth Circuit deliberately ignoring this Court's binding precedent.

The first question concerns the collateral bar rule, which provides that a party appealing a

criminal contempt conviction may not challenge the validity of the court order which the appellant was convicted of violating. This Court has twice stated that the collateral bar rule only applies to orders which the appellant had a prior opportunity to challenge by meaningful appellate proceedings. *See Walker v. City of Birmingham,* 388 U.S. 307, 319 (1967); *U.S. v. Ryan,* 402 U.S. 530, 532 n.4 (1971). Based on this Court's statements of law, every federal court of appeal to address this issue, but one, has held that the collateral bar doctrine only applies to orders which the appellant had a prior opportunity to challenge by meaningful appellate proceedings. *See U.S. v. Dickinson,* 465 F.2d 496, 511 (5th Cir. 1972); *U.S. v. Cutler,* 58 F.3d 825, 832-833 (2d Cir. 1995); *Matter of Providence Journal Co.,* 820 F.2d 1342, 1346-47 (1st Cir. 1986), *modified,* 820 F.2d 1354 (1st Cir. 1987) (in banc); *In re Novak,* 932 F.2d 1397, 1401 (11th Cir. 1991). The Ninth Circuit is the exception, holding that a meaningful prior opportunity for appellate review is not required for the collateral bar rule to apply. *In re Establishment Inspection of Hern Iron Works, Inc.,* 881 F.2d 722, 725-26 (9th Cir. 1989). Thus under Ninth Circuit precedent a district court's illegal but unappealable order may never be effectively challenged until the entire litigation is concluded.

The second question presented to this Court arises from the order that two of the Petitioners were convicted of violating. This order barred Petitioners from exercising a *lis pendens* remedy in state court divorce proceedings. The Petitioners appealed the first order dated May 15, 2003, which they were convicted of violating, and separately

appealed the second, reissued order made at the time of the conviction. Pet. App. C2-3. The first appeal was dismissed by the Ninth Circuit without explanation. The appeal of the second order was also dismissed, on the grounds that the order did not constitute an appealable injunction or collateral order. In so ruling, the Ninth Circuit Court of Appeals joined the Third Circuit Court of Appeals, which holds that an injunction barring a federal court litigant from filing a lawsuit or otherwise seeking a remedy in parallel state court proceedings is not an appealable order unless that specific remedy is prayed for by the moving litigant in its complaint. *Hershey Foods Corp. v. Hershey Creamery Co.*, 945 F.2d 1272, 1278 (3d Cir. 1991). This view has been rejected by the First, Second, Fifth, Sixth, Seventh, Tenth, and Federal Circuits, all of which hold that an order preventing a party from seeking relief in state court is an immediately appealable order. *See, e.g., FDIC v. Santiago Plaza, Inc.*, 598 F.2d 634, 635-636 (1st Cir. 1979); *HBE Leasing Corp v. Frank*, 48 F.3d 623, 632 n.6 (2d Cir. 1995); *Phillips v. Chas. Schreiner Bank*, 894 F.2d 127, 130 (5th Cir. 1990); *AmSouth Bank v. Dale*, 386 F.3d 763, 772-774 (6th Cir. 2004); *Asset Allocation & Mgmt. Co. v. W. Employers Ins. Co.*, 892 F.2d 566, 568 (7th Cir. 1989); *MAI Basic Four, Inc. v. Basis, Inc.*, 962 F.2d 978, 981-3 (10th Cir. 1992); *Katz v. Lear Siegler, Inc.*, 909 F.2d 1459, 1461 (Fed. Cir. 1989).

The reason that Viveca sought to file a notice of *lis pendens* was to ensure that she would be able to reverse the sale of the subject property. This sale was being conducted in state court divorce

proceedings by a specially appointed judicial officer, Philip Maxeiner. Maxeiner is the accountant of Viveca's former husband, Defendant and Respondent Sassan Sanai. He was a witness for Sassan in the divorce proceedings. Despite all of this, the Washington State trial court appointed Maxeiner as a "special master" to adjudicate certain issues and carry out the orders of the court in relation to the divorce. Viveca appealed this order in state court. The state courts disqualified her counsel, Fredric Sanai, then elevated Maxeiner to the position of a judicial referee, declining to even address Viveca's arguments that Maxeiner's financial interest in the litigation, arising out of his concurrent employment as Sassan's accountant, made his appointment a violation of the Fourteenth Amendment.

With no effective recourse available to combat the state court appointments of an agent of the opposing side as a judicial officer, as no local counsel would risk the wrath of the local judiciary to attack Maxeiner's obviously unconstitutional appointment, Petitioners filed an action in federal court collaterally attacking the disqualification under 42 U.S.C. §1983. The district court dismissed the action on the basis of the *Rooker-Feldman* doctrine. The Ninth Circuit Court of Appeals upheld the application of *Rooker-Feldman* based on its published decision in *Mothershed v. Justices of the Supreme Court*, 410 F.3d 602, 606-07 (9th Cir. 2005). In *Mothershed*, the Ninth Circuit Court of Appeal interpreted this Court's decision in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005) to permit application of the *Rooker-Feldman* doctrine in any case where a state court had decided

a single federal question, even if the state court proceedings continue and other federal questions remain to be determined. This interpretation of *Exxon Mobil* directly conflicts with the interpretation of the First Circuit, which held that *Rooker-Feldman* only applies if the case has terminated or is ripe for review by this Court. *Federacion de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico,* 410 F.3d 17 (1st Cir. 2005).

The fourth question presented arises from a separate suit seeking, *inter alia*, to preliminarily enjoin Maxeiner from acting as a judicial official in the case under 42 U.S.C. §1983. The trial court and Court of Appeal both held that this suit was barred under *Younger* abstention. In so doing, they refused to acknowledge the existence of this Court's binding precedent which holds a suit seeking to enjoin a state judicial official from acting in lawsuit in which that official has a financial conflict of interest an "extraordinary circumstance" which causes *Younger* abstention to be inapplicable as a matter of law. *See Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973).

OPINIONS BELOW

The Ninth Circuit opinion dated August 17, 2005, Pet. App. A, is unpublished, but may be found at 2005 U.S. App. LEXIS 17785 and 141 Fed. Appx. 67. The Ninth Circuit's October 24, 2005 order denying the petitions for rehearing and rehearing en banc, App. B, is unpublished.

This Memorandum Decision disposed of four separate appeals. The first two appeals, 03-35797 and 03-35932, arose from a trial court proceeding

that was itself a consolidation of two federal question action, CV-02-2165TSZ, and a diversity action, CV-02-2560TSZ. The third appeal, 04-35041, arose from a separate action under 42 USC §1983, CV-03-02781JCC. The fourth appeal, 04-35881 arose from a federal question action including a cause of action under 42 U.S.C. §1983, CV-04-01594-TSZ.

The September 26, 2003 order of the trial court in case no. 02-2165 finding Petitioners Fredric Sanai and Viveca Sanai in criminal contempt of court, Pet. App. C, is unpublished. The December 12, 2003 opinion of the trial court in 04-35041, dismissing Petitioners' suit under 42 U.S.C. §1983, Pet. App. D, is unpublished. The October 8, 2004 order denying a motion for preliminary injunction against referee Philip Maxeiner, Pet. App. E, is unpublished. The rationale for the trial court's decision to deny the motion for a preliminary injunction is set forth in a subsequent order dated October 24, 2004 denying a motion for an injunction pending appeal, relevant portions of which are set forth in Pet. App. F.

BASIS FOR JURISDICTION

The Ninth Circuit Court of Appeals issued its order denying Petitioners' Petitions for Rehearing and Rehearing en banc on October 24, 2005. Pet. App. B. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

The relevant statutory and constitutional provisions are set forth in Pet.App. G, and include the Fifth Amendment, the Fourteenth Amendment, 28 U.S.C. §1292(a)(1), 28 U.S.C. §1257and 42 U.S.C. §1983.

STATEMENT OF THE CASE

This petition arises from an unpublished decision of the Ninth Circuit Court of Appeals that disposes of four appeals arising from four trial court actions, two of which were consolidated.

The first two questions relate to a consolidated federal question lawsuit for wiretapping and violations of ERISA, docket no. CV-02-2165, filed by, *inter alia*, Petitioners Cyrus Sanai, Fredric Sanai, and Viveca Sanai, and a separately filed diversity action where Cyrus Sanai and Fredric Sanai are the only plaintiffs, CV-02-2560Z. The jurisdictional basis for the two actions were thus federal question jurisdiction, 28 U.S.C. §1331, and diversity jurisdiction, 28 U.S.C. §1332.

In this case the district court canceled a *lis pendens* filed by Cyrus in the diversity action and issued an order that the plaintiffs should "cease and desist" from filing additional lis pendens. 03-35797 ER 197. The notice of *lis pendens* was filed in respect of certain disputed real property.

During oral argument Cyrus asked if that order applied to state court divorce proceedings. *See*

Transcript of May 15, 2003 hearing p 43 l. 19 to p. 44 l.2, ll. 5-7, p.45 ll. 4-9, p.46 l.24 to p. 47 l. 3. The district court stated, on the record, that the "cease and desist" order would have no effect on anything occurring in state court. *Id.*

Petitioners appealed the "cease and desist" order to the Ninth Circuit Court of Appeal, relying on out-of-circuit authority that an order prohibiting a party from filing a lis pendens is a preliminary injunction. *See Sanai v. Sanai,* Ninth Circuit Court of Appeals docket no. 03-35426; judicial notice granted in order of August 15, 2005. The Ninth Circuit on its own motion dismissed the appeal in docket no. 03-35426; Petitioners filed a motion for reconsideration explicitly raising the issue that this order was an anti-suit preliminary injunction, which was denied by the Ninth Circuit. *See* Motion for Reconsideration dated August 1, 2003 in docket no. 03-35426 at 9.

In the meantime Viveca had placed a notice of *lis pendens* over the same property in a suit continuing the divorce proceedings. 03-35797 ER 257-9. Sassan filed a cross-complaint with the federal district court for "Slander of Title" and "Abuse of Process" in respect of the filing of the lis pendens in the state court proceeding, requesting damages and "such other further relief as the Court deems just and proper." 03-35797 ER 390-397.

Sassan filed a motion for civil contempt and for a preliminary injunction with the district court. 03-35797 ER 261. The trial court issued an order scheduling oral argument on whether "any relief" should be granted pursuant to Sassan's motion. 03-35797 ER 261. No mention of criminal contempt

sanctions was made therein. At the hearing on September 26, 2003, the district court stated, on the record, that its prior order was in fact an injunction and repudiated its previous statement that the "cease and desist order" did not affect state court litigation. *See* September 26, 2003 Transcript at 26:3-6. The district court sua sponte found Viveca and Fredric in criminal contempt. Pet. App. C2-3. The district court reissued its order barring Plaintiffs from filing notices of *lis pendens* or otherwise notifying third parties regarding the state court suit. *Id.* This was a bare prior restraint of First Amendment rights.

Petitioners filed an appeal, docket no. 03-35797, of the order on the grounds, *inter alia,* that it was (a) a criminal contempt order, and (b) a modification of a prior injunction.

The Ninth Circuit issued orders to show cause as to the appealability of the orders in both appeals. After briefing, on January 16, 2004 Circuit Judges Silverman and Beezer discharged the orders to show cause, ruling that appeal 03-35797 was a preliminary injunction appeal. The Court also consolidated appeals 03-35797 with appeal 03-35932; that latter appeal is not at issue in this petition.

In its August 17, 2005 memorandum decision the Ninth Circuit addressed appeal 03-35797 as follows:

> The court acted within its authority when it entered the contempt order. *See F.J. Hanshaw Enterprises, Inc. v. Emerald River Dev. Inc.*, 244 F.3d 1128, 1136-37 (9th Cir. 2001). Appellants' challenge to the contempt order under

> the Anti-Injunction Act is precluded by the collateral bar rule. *See In re Establishment Inspection of Hern Iron Works, Inc.*, 881 F.2d 722, 725-26 (9th Cir. 1989). Appellants had sufficient notice of the contemplated contempt finding. *See United States v. Rylander*, 714 F.2d 996, 1004 (9th Cir. 1983). The portion of the contempt order prohibiting the filing of any additional lis pendens is not appealable as a preliminary injunction, because it granted no indefinite or permanent substantive relief. *See Carson*, 450 U.S. at 89-90.

Pet. App. A3 ¶3.

The primary grounds for Viveca's filing of a notice of *lis pendens* on the disputed real property was the fact that Sassan convinced Joseph Thibodeau, a Snohomish County Superior Court Judge, to appoint Sassan's accountant, Philip Maxeiner, a witness in the case, as a judicial referee who now controls all of Viveca's finances. 04-35041 ER 177:26 to 178:16; ER 22:16-19. The Snohomish County Superior Court issued a final decree incorporating Maxeiner's appointment on April 12, 2002. 04-35041 ER 22:17-19. Both Sassan and Viveca appealed the decree. *Id.* Viveca's appeal rested, in large part, on the appointment of Maxeiner as a judicial official in the case.

At this time Fredric Sanai, an attorney qualified in Washington and Oregon, became Viveca's appellate counsel and co-counsel at the trial level. 04-35041 ER 23:1-2. Sassan filed a motion to disqualify Fredric as Viveca's counsel. 04-35041 ER

23:2-3. It is undisputed that the disqualification violated the constitutional rights of Fredric and Viveca. On May 26, 2005, Thibodeau recused himself from the divorce case, admitting he was biased against Viveca. Judicial notice granted at Pet. App. B2.

On October 23, 2002, Viveca filed a notice of appeal with the Washington State Court of Appeal of the order disqualifying Fredric. 04-35041 ER 23:12-15. Washington State Court of Appeal Justices Baker and Appelwick and a third justice of the Washington State Court of Appeals dismissed all of Viveca's post-judgment appeals, including the appeals of the order disqualifying Fredric, denying both of them the right to challenge the disqualification on the merits. 04-35041 ER 24:15-20; 04-35041 ER 52-3.

Justice Baker was, before his appointment to the Washington State Court of Appeals, a name partner in the small Everett, Washington law firm of Anderson Hunter (then called Anderson, Hunter, Dewall, Baker & Collins). Sassan has been a client of Anderson Hunter for many years, including the period in which Justice Baker was one of its name partners. One of Justice Baker's former partners, Virginia Antipolo-Utt, handled the ERISA accounts that were one of the primary assets in the marriage dissolution case since 1988, and was a witness in the divorce proceeding. 04-35041 ER 237:6-13; 04-35041 ER 239:11-19. Justice Baker also has a financial interest in the day-to-day operations of Anderson Hunter. Judicial notice granted at Pet. App. B2.

Viveca filed a Motion for Discretionary Review of the Washington State Court of Appeals' March 11, 2003 order with the Washington State Supreme Court. 04-35041 ER 24:21-23. Rather than ruling on

them, Geoffrey Crooks, Commissioner of the Washington State Supreme Court, *sua sponte* requested briefing on the question of whether Fredric was disqualified from pursing his appellate challenge to his own disqualification on behalf of Viveca. 04-35041 ER 24:24-25. Briefing was submitted, and the Commissioner issued a ruling on June 10, 2003, disqualifying Fredric from litigating his disqualification. 04-35041 ER 25:4-7. Viveca requested leave from the Court of Appeals for Fredric to appear for her. 04-35041 ER 25:11-12. Though Sassan conceded that the Court of Appeals had never disqualified Fredric from appearing before it, it followed the lead of the Supreme Court and denied Fredric permission to appear. 04-35041 ER 25:13-16. The divorce action is still ongoing.

Petitioners filed an action in federal court against state court officers Thibodeau, Crooks, Baker, Appelwick and Ellington seeking injunctive and declaratory relief under 42 U.S.C. §1983, which creates federal jurisdiction under 28 U.S.C. §1331. The district court dismissed the action on the basis of the *Rooker-Feldman* doctrine. Pet. App. D. The Court of Appeals addressed this appeal as follows:

> The district court properly applied the *Rooker-Feldman* doctrine to dismiss Appellants' challenge to the state court's disqualification of Frederic Sanai as counsel for Viveca Sanai. *See Mothershed v. Justices of the Supreme Court,* 410 F.3d 602, 606-07 (9th Cir. 2005) (noting lack of jurisdiction over challenges to "state-court losers complaining of injuries caused by state court judgments rendered before the

> district court proceedings commenced.") (citations omitted). *Rooker-Feldman* applies to the interlocutory orders at issue in this case. *See id.* n.3, *see also Doe and Assocs. Law Offices v. Napolitano*, 252 F.3d 1026, 1030 (9th Cir. 2001).

Pet. App. A3.

Maxeiner's appointment was directly attacked in federal court in a fourth lawsuit filed by Petitioners. Petitioners filed a motion for a preliminary injunction to enjoin Maxeiner's continued actions as a judicial referee under 42 U.S.C. §1983. Petitioners argued that the bias at the trial court and appellate level made fair presentation of her constitutional arguments impossible, and that the pecuniary interests of Maxeiner and Baker in Sassan's well being as a client constituted "extraordinary circumstances" barring the application of *Younger* abstention under *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973). The district court found that *Younger* abstention applied, refusing to address the question of Maxeiner's financial interest in the litigation. Pet. App. F4-5. The district court also imposed an indefinite stay on the lawsuit, which is still ongoing a year later. Pet. App. E1. The Court of Appeals likewise found that *Younger* abstention applied and likewise refusing to acknowledge the existence of the "extraordinary circumstances" exception, instead citing to one of the many Ninth Circuit precedents that decline to acknowledge the existence of that exception. Pet. App. A3.

Petitioners timely filed petitions for rehearing and rehearing en banc, which were denied on October 24, 2005. Pet. App. B.

WHY THE PETITION SHOULD BE GRANTED

1. There is an Intractable Conflict Between the Ninth Circuit and the Opinions of This Court and Every Other Federal and State Appellate Court Concerning the Applicability of the Collateral Bar Rule to Unreviewable Orders.

The collateral bar rule provides that a person convicted of criminal contempt for violation of an order by the district court may not attack the merits of that order. In *Walker v. City of Birmingham,* 388 U.S. 307, 319 (1967), this Court expressly conditioned the application of the collateral bar rule in criminal contempt cases to the availability of "an expedited process of appellate review" the order. This holding was reiterated in *U.S. v. Ryan*, 402 U.S. 530, 532 n.4 (1971), where this Court wrote that "*Walker v. Birmingham*, 388 U.S. 307 (1967), is not to the contrary. Our holding that the claims there sought to be asserted were not open on review of petitioners' contempt convictions was based upon the availability of review of those claims at an earlier stage. " As in *Walker*, the district court's May 15, 2003 and September 26, 2003 orders barring Petitioners from filing notices concerning state court proceedings restricted Petitioners core First Amendment rights of speech and to petition state

government in state court proceedings. Pet. App. C2-3.

Based on these two decisions of this Court, with one exception all federal appellate courts and state appellate courts in jurisdictions which apply the collateral bar rule have held, when presented with the issue, that a meaningful opportunity for prior appellate review is a precondition for application of the collateral bar rule. "[T]he collateral bar rule presupposes that adequate and effective remedies exist for orderly review of the challenged ruling; in the absence of such an opportunity for review, the accused contemnor may challenge the validity of the disobeyed order on appeal from his criminal contempt conviction and escape punishment if that order is deemed invalid". *In re Novak*, 932 F.2d 1397, 1401 (11th Cir. 1991), *citing U. S. v. Dickinson,* 465 F.2d 496, 511 (5th Cir. 1972); *see also Matter of Providence Journal Co.,* 820 F.2d 1342, 1346-47 (1st Cir. 1986), *modified,* 820 F.2d 1354 (1st Cir. 1987) (in banc); *U.S. v. Cutler,* 58 F.3d 825, 832-833 (2d Cir. 1995); *Piña v. Espinoza*, 130 N.M. 661, 669, 29 P.3d 1062 (2001) (*citing Novak*, *supra*); *Wurpts v. Iowa Dist. Ct., Sioux Cty*, 687 N.W.2d 286, 289-90 (Iowa App. 2004); *State v. Alston*, 256 Kan. 571, 587-588, 887 P.2d 681 (1994)(*citing Providence Journal, supra*). Some of these courts, such as the First Circuit and the Kansas Supreme Court, impose an additional requirement that the accused contemnor actually attempt to obtain appellate review. *See Providence Journal Co., supra; Alston, supra.* That distinction is not relevant to this case, as Petitioners filed a timely appeal of both relevant orders, and both appeals were dismissed by the Ninth Circuit on

the grounds that the orders of the district court barring the Petitioners from seeking relief in state court were not appealable.

The exception to this line of precedent is from the Ninth Court of Appeals, namely *In re Establishment Inspection of Hern Iron Works, Inc.*, 881 F.2d 722 (9th Cir. 1989). *Hern* involved a criminal contempt conviction for violation of an ex parte administrative search order. The appellant in *Hern* sought to attack the criminal contempt conviction on the grounds that the issuance of the original search warrant was invalid. *Id.* at 725. The Ninth Circuit explicitly held that a meaningful opportunity for prior appellate review of an order is not a prerequisite for the collateral bar rule to prevent review of the propriety of that order in a subsequent appeal of a criminal contempt conviction. While acknowledging that this Court's *Walker* opinion reflected a "strain in our law that runs contrary to the general proposition that court orders must always be obeyed", the Ninth Circuit nonetheless held that so long as the underlying minimum due process protections for issuing the order were followed, the correctness of the order could not be questioned in an appeal from a subsequent contempt conviction, even if there were no opportunity for meaningful appellate review of the order. *Hern, supra,* at 727 n. 15. The Ninth Circuit explicitly relied upon *Hern* in the instant case, ruling that "Appellants' challenge to the contempt order under the Anti-Injunction Act is precluded by the collateral bar rule. *See In re Establishment Inspection of Hern Iron Works, Inc.*, 881 F.2d 722, 725-26 (9th Cir. 1989)".

Thus, contrary to every other appellate court to have considered the matter, the Ninth Circuit endorses the punishment of persons who are found by a judge to have violated erroneous or unconstitutional orders but were unable to obtain meaningful appellate review. This is plainly wrong. As the Fifth Circuit Court of Appeals noted, the collateral bar rule privileges the orders of the judicial branch above orders of the executive branch or laws passed by the legislative branch, all of which may be challenged in proceeding brought to punish the defendant for violation thereof; indeed, outside the First Amendment context, a defendant must bring such challenges in respect of an enforcement proceeding, and not prospectively. *Dickenson, supra,* at 510. However, so long as it is possible to challenge the order through immediate, meaningful, appellate review, the litigant is in no substantively worse position than when dealing with an executive branch order or legislative enactment. The collateral bar rule seeks to penalize "the deliberate refusal to obey an order of the court without testing its validity through established processes", and is not intended as a license for trial court judges to issue unconstitutional orders that are effectively unchallengeable before a reviewing court. *Id.*

The necessity of immediate, effective appellate review is doubly necessary because the collateral bar cases ordinarily arise in the context of exercise of First Amendment rights. *See, e.g., Dickenson, supra; Providence Journal Co., supra; Cutler, supra; Alston, supra.* In the instant case the district court sought, for reasons it never articulated, to prevent the Petitioners from notifying prospective purchasers for

property of ongoing litigation through filing of public notices with the Snohomish County Superior Court Auditor's office; the order was thus a prior restraint on core First Amendment rights of speech and petitioning. This Court should thus grant review on this issue to resolve the conflict between the Ninth Circuit Court of Appeal and every other appellate court to have ruled on the application of this Court's *Walker* and *Ryan* decisions to those cases where the order in question was not subject to immediate, meaningful appellate review.

This case offers an ideal vehicle for addressing the seventeen-year old circuit split created by *Hern*. The Petitioners filed timely appeals of the relevant orders barring them from filing *lis pendens*, and the appeals were dismissed twice. Petitioners filed timely petitions for rehearing en banc that explicitly raised the issue to the entire Ninth Circuit, and were rebuffed. The issue was thus put squarely before the Ninth Circuit, and is ripe for review by this Court.

2. There is an Intractable Circuit Split Concerning the Appealability of District Court Orders Barring Litigants from Seeking Relief in Parallel State Court Proceedings.

It has long been the unanimous view of the federal appellate courts that a district court order barring a litigant from seeking relief in a state court proceeding is an immediately appealable order under 28 U.S.C. §1292(a)(1). *See, e.g. Maryland v. Atlantic Aviation Corp.*, 361 F.2d 873 (3d Cir.)(per curiam); *FDIC v. Santiago Plaza, Inc.*, 598 F.2d 634, 635-636 (1st Cir. 1979); *National Equipment Rental, Ltd. v. Fowler*, 276 287 F.2d 43 (2d Cir. 1961); *Guy v.*

Citizens Fid. Bank & Trust Co., 429 F.2d 828, 831 (6th Cir. 1970). However, the Third Circuit, and now the Ninth Circuit, have broken away from the other circuits to hold that an order barring a federal court litigant from seeking relief in state court "must relate to the relief ultimately sought by the claimant in order to be appealable under section 1292(a)(1)". *Hershey Foods Corp. v. Hershey Creamery Co.*, 945 F.2d 1272, 1278 (3d Cir. 1991). In *Hershey*, the Third Circuit overruled its prior decision in *Atlantic Aviation*, finding that "[i]n light of the recent case law" such as this Court's decision in *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 89-90 (1981)", the only time an order barring a litigant from seeking relief in an ongoing state court proceeding is immediately appealable is where the moving party has explicitly requested such relief in its complaint. *Hershey, supra,* at 1277-78.

In the instant case, the Ninth Circuit adopted the reasoning of *Hershey*, ruling that "the order barring the filing of *lis pendens* in state court proceedings is not appealable as a preliminary injunction, because it granted no indefinite or permanent substantive relief. *See Carson,* 450 U.S. at 89-90." Pet. App. A3. The Ninth Circuit is now at odds with the First, Second, Fifth, Sixth, Seventh, Tenth, and Federal Circuits, all of which hold that an order preventing a party from seeking relief in state court is an immediately appealable order. *See, e.g., Santiago Plaza, supra; HBE Leasing Corp v. Frank,* 48 F.3d 623, 632 n.6 (2d Cir. 1995); *Phillips v. Chas. Schreiner Bank,* 894 F.2d 127, 130 (5th Cir. 1990); *AmSouth Bank v. Dale,* 386 F.3d 763, 772-774 (6th Cir. 2004); *Asset Allocation & Mgmt. Co. v. W.*

Employers Ins. Co., 892 F.2d 566, 568 (7th Cir. 1989); *MAI Basic Four, Inc. v. Basis, Inc.*, 962 F.2d 978, 981-3 (10th Cir. 1992); *Katz v. Lear Siegler, Inc.*, 909 F.2d 1459, 1461 (Fed. Cir. 1989). This conflict is irreconcilable. In *AmSouth Bank*, the Sixth Circuit considered the argument that the "circuit should go against the weight of authority and adopt the Third Circuit's outlier opinion in *Hershey*." *AmSouth, supra*, at 773. The Sixth Circuit explicitly rejected this approach, choosing to stick with the majority view. *Id.* Similarly, the Tenth Circuit explicitly rejected the *Hershey* analysis offered by the appellee in *MAI Basic Four, supra*, at 981-3.

The appealability of an order prohibiting a litigant from seeking relief in concurrent state court proceedings arises frequently, and is of critical importance. This Court has repeatedly affirmed that parallel state and federal litigation is an embedded and accepted feature of the American legal system, most recently in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 294 fn. 9 (2005). The approach of the Ninth and Third Circuits puts this right under the unchallengeable discretion of federal district courts. If a federal district court's decision to prohibit relief from state court proceedings is not subject to immediate review, then in virtually every case the constitutional right to seek relief in state court will be irretrievably lost. Moreover, the distinction drawn by the Third Circuit turns the appealability or non-appealabilty of such an order into a matter of pleading; if such relief is requested in the complaint, the order is appealable, but if not, then the order is not appealable. The result is easy to see from this case; a litigant may, under the Ninth

and Third Circuit approach obtain a critical advantage in unrelated state court proceedings by convincing the federal court judge in a concurrent lawsuit to prevent the other side from exercising particular remedies available as a matter of right in that state court forum.

Uniformity on matters of appellate jurisdiction are exceptionally important, as they given the flow of cases and controversies to this Court and the effective oversight of the district courts by the appellate courts. Given that the Sixth and Tenth Circuits have explicitly rejected Hershey, there is no possibility of this split being resolved without this Court's intervention. This case provides an ideal vehicle for addressing the increasingly fractured positions of the minority and majority view on this issue. The issue of the appealability of the relevant orders were placed squarely before the Ninth Circuit. This Court should grant review on this issue to resolve the irreconcilable and long-standing split between the now two-circuit minority of the Third and Ninth Circuits on the one hand, and the First, Second, Fifth, Sixth, Seventh, Tenth, and Federal Circuits on the other.

3. There is a Growing Circuit Split Concerning the Time at Which the *Rooker-Feldman* Doctrine Applies to a State Court Proceeding Which this Court Should Resolve.

Last year this Court rendered a decision, *Exxon Mobil, supra*, which substantially cut back the ever-widening application of the *Rooker-Feldman* doctrine to parallel state and federal jurisdiction. In *Exxon Mobil* this Court held that the *Rooker-Feldman*

doctrine requires dismissal of only those federal lawsuits, initiated "after the state proceedings [have] ended", which seek appellate review of the state court judgment. This Court held in particular that where the federal lawsuit is initiated while the state lawsuit is pending, *Rooker-Feldman* will never apply, even if the state court proceeding results in a final judgment prior to the conclusion of the federal lawsuit.

Since *Exxon Mobil* was decided, the First Circuit and Ninth Circuit have addressed the seemingly straightforward question of what constitutes termination of a state court proceeding for purposes of the *Rooker-Feldman* doctrine, and arrived at markedly different answers. *Compare Federacion de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico*, 410 F.3d 17 (1st Cir. 2005) *with Mothershed v. Justices of the Supreme Court*, 410 F.3d 602 (9th Cir. 2005).

The First Circuit pointed out that "*Exxon Mobil* tells us when a state court judgment is sufficiently final for operation of the *Rooker-Feldman* doctrine: when "the state proceedings [have] ended." 125 S.Ct. at 1526." *Federacion, supra*, at 24. "If federal litigation is initiated before state proceedings have ended, then -- even if the federal plaintiff expects to lose in state court and hopes to win in federal court -- the litigation is parallel, and the *Rooker-Feldman* doctrine does not deprive the court of jurisdiction." *Id.* The First Circuit identified three circumstances where "state proceedings have ended", thus removing federal court jurisdiction under *Rooker-Feldman*: (1) the state appellate process has been completed; (2) an aggrieved litigant has abandoned the state

appellate process; and (3) "if the state court proceedings have finally resolved all the federal questions in the litigation, but state law or purely factual questions (whether great or small) remain to be litigated", which is generally known as the *Cox Broadcasting* test. *Id.* at 24-25; *see also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The First Circuit concluded that "*Exxon Mobil* and *ASARCO*, read together, suggest that if state court litigation is sufficiently final for Supreme Court review, then it is sufficiently final for purposes of the *Rooker-Feldman* doctrine." *Federacion, supra,* at 26.

The Ninth Circuit arrived at a very different test in *Mothershed*. This opinion explicitly quoted the key language from *Federacion*: "if the state court proceedings have finally resolved all the federal questions in the litigation, but state law or purely factual questions (whether great or small) remain to be litigated, then the state proceedings have 'ended' within the meaning of *Rooker-Feldman*." *Mothershed, supra,* at 606 fn.3. However, the *Mothershed* test for finality skewed away from *Federacion*, holding that the actual interlocutory determination of a single federal issue by a state high court invokes *Rooker-Feldman* as to that issue. *Id.*

The Ninth Circuit's test for *Rooker-Feldman* finality results in dramatically different results from the First Circuit's test. Under the First Circuit's view, *Rooker-Feldman* only applies when a case has become ripe for review by this Court, or the litigation has been abandoned or completely ended. Under the Ninth Circuit's view, if there is a single issue that a state high court has had presented to it by any party

in state court litigation at any stage of the state court litigation, the entire parallel federal lawsuit becomes subject to dismissal. Thus a party seeking to obtain a *Rooker-Feldman* dismissal of a parallel federal court action need only make an application for discretionary interlocutory relief to the state high court on a single common federal issue; if that is summarily refused by the state high court, then the litigant may obtain a *Rooker-Feldman* dismissal on the grounds that the common issue has been "finally determined" by the state high court. This is an absurd result which demonstrates that the Ninth Circuit's test for finality is inconsistent with the logic of *Exxon Mobil*.

Intervention by this Court in this burgeoning schism in interpretation of *Exxon Mobil* would be fully justified at this time. *Exxon Mobil* was decided last year, and the issues are no doubt still fresh in the mind of those Justices who signed that unanimous opinion. Resolving the split between the Ninth and First Circuits will involve relatively little effort by this Court, since it essentially consists of elucidating what the Court meant by the phrase "after the state proceedings [have] ended" in *Exxon Mobil*. This case is an ideal vehicle for resolving this issue, because the question was clearly presented to the Ninth Circuit and, along with resolution of the fourth question, is outcome determinative of the relevant appeal.

4. The Court of Appeals Erred by Refusing to Acknowledge this Court's Binding Precedent Concerning the Extraordinary Circumstances Exception to *Younger* Abstention.

Under the Fourteenth Amendment and 42 U.S.C. §1983, federal courts are the guarantors that state courts will comply with minimum federal constitutional safeguards established by the Fourteenth Amendment. This Court has consistently upheld the availability of declaratory and injunctive relief against state judges and regarding state proceedings which violate basic constitutional rights. *Mitchum v. Foster*, 407 U.S. 225, 240 (1972); *Pulliam v. Allen*, 466 U.S. 522, 537-8 (1984); *see also Mireles v. Waco*, 502 US 9 (1991)("The Court, however, has recognized that a judge is not absolutely immune ... from a suit for prospective injunctive relief....").

When a state proceeding is ongoing, a plaintiff seeking to enjoin that proceeding on constitutional grounds must demonstrate that *Younger* abstention does not apply. *See Younger v. Harris*, 401 U.S. 37 (1971). *Younger* abstention applies to a suit under 42 U.S.C. §1983 when the "*Middlesex*" factors are met: "Absent 'extraordinary circumstances' (including but not limited to bad faith and harassment), abstention in favor of state judicial proceedings is required if the state proceedings (1) are ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims." *Hirsh v. Justices of the Supreme Court of the State of Cal.*, 67 F.3d 708, 712 (9th Cir. 1995); *see also Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423

(1982). Petitioners conceded for purpose of their appeal that the first two factors were met, but argued that the inherent bias created by the financial and other ties between Sassan and Justice Baker and Sassan and judicial referee Maxeiner, and various other factors meant that (a) there was no adequate opportunity to litigate federal claims, and (b) that the "extraordinary circumstances" exception enunciated by this Court in *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973), applied.

In *Gibson* this Court held that though "*Younger v. Harris* contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts", it "presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Gibson, supra,* at 573. Where a state tribunal was biased, "the predicate for a *Younger v. Harris* dismissal was lacking, ...[the state tribunal] was incompetent by reason of bias to adjudicate the issues pending before it. " *Id.* "Nor, in these circumstances, would a different result be required simply because judicial review, de novo or otherwise, would be forthcoming at the conclusion...." *Id.* at 579.

Philip Maxeiner, a witness in the divorce case and Sassan's accountant, was appointed as judicial official in the divorce litigation by the Washington state courts. This was plainly a violation of the Fourteenth Amendment and merited a federal court injunction against the state court proceedings on this basis alone. The extraordinary circumstances identified in *Gibson* were clearly present. However, both the district court and the Ninth Circuit simply

refused to acknowledge this Court's binding precedent on this point. Indeed, the Ninth Circuit's opinion cites to one of its many published decisions where the particular panel has chosen to ignore the existence of the extraordinary circumstances exception to *Younger* abstention.

In addition to Maxeiner's financial interest in the litigation due to his employment as the accountant for Sassan Sanai, Defendant and Respondent Justice William Baker, who authored the opinion of the Washington State Court of Appeals appointing Maxeiner as a judicial referee, had a financial relationship to Sassan Sanai. Baker held a financial interest in the Anderson Hunter law firm, which law firm was Sassan's primary business counsel. This financial connection to Sassan was also sufficient to create at least a disabling appearance of a lack of impartiality, requiring Justice Baker's recusal under the Fourteenth Amendment. *See Aetna Life Ins. Co. v. Lavoie*, 475 US 813 (1986).

On this issue, there no direct conflict between a published Ninth Circuit decision and the published decisions of other Circuits. Instead, this question involves an intentional refusal by the district court and the Ninth Circuit to address this Court's binding precedent. This Court should nonetheless grant review on this question because fair review of the third question concerning *Rooker-Feldman* requires this Court to address whether *Younger* abstention was an appropriate alternative basis for dismissal of the 42 U.S.C. §1983 action against the relevant judges. Though Petitioners believe that the fourth question concerning *Younger* abstention is fairly encompassed by the third question concerning

Rooker-Feldman, they are highlighting this issue separately to ensure that it is not overlooked.

CONCLUSION

For the forgoing reasons, the petition for certiorari should be granted.

Dated this January 23, 2006

Respectfully submitted,

Viveca Sanai

Viveca Sanai, pro se.

Cyrus Sanai

Cyrus Sanai, pro se.

Fred Sanai

Fredric Sanai, pro se.

APPENDIX

VIVECA SANAI; et al., Plaintiffs - Appellants, v. SASSAN SANAI, Defendant - Appellee. VIVECA SANAI; et al., Plaintiffs - Appellants, v. SASSAN SANAI; et al., Defendants - Appellees. VIVECA SANAI, an individual; et al., Plaintiffs - Appellants, v. JOSEPH THIBODEAU, an individual; et al., Defendants - Appellees. VIVECA SANAI, an individual; et al., Plaintiffs - Appellants, v. SASSAN SANAI, an individual; et al., Defendants - Appellees.

No. 03-35797, No. 03-35932, No. 04-35041, No. 04-35881.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

April 8, 2005**, Submitted, Seattle, Washington**This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

August 17, 2005, Filed

Appeal from the United States District Court for the Western District of Washington, D.C. No. CV-02-02165-TSZ, D.C. No. CV-02-02165-TSZ, D.C. No. CV-03-02781-JCC, D.C. No. CV-04-01594-TSZ, Thomas S. Zilly, District Judge, Presiding, John C. Coughenour, Chief Judge, Presiding.

Before: CANBY, BEEZER, and RAWLINSON, Circuit Judges.

MEMORANDUM*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3. [*2]

1. The following orders are non-final and beyond our jurisdiction to review:
a. The May 15, 2003 order releasing the *lis pendens*. *See Special Invs., Inc. v. Aero Air, Inc.*, 360 F.3d 989, 993 (9th Cir. 2004). The order is not appealable as an injunction. *See Shee Atika v. Sealaska Corp.*, 39 F.3d 247, 248 (9th Cir. 1994)(describing jurisdiction over orders where the language of 28 U.S.C. § 1292(a)(1) is satisfied).

b. The October 17, 2003 protective order. *See Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1490 (9th Cir. 1989) (describing discovery orders as non-appealable). The order is not an injunction, because no state court proceedings are enjoined. *See Sperry Rand Corp. v. Rothlein*, 288 F.2d 245, 248 (2d Cir. 1961). Neither does this case meet the requirements for consideration of a writ of mandamus. *See Bauman v. United States Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977).

c. The October 23 and October 27, 2003 partial summary judgment orders. *See American States Ins. Co. v. Dastar Corp.*, 318 F.3d 881 (9th Cir. 2003). The case *of Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), is based on a unique California statute that does not apply in this Washington case.

d. The November 14, 2003 order denying Appellants' motion to dismiss. *See Credit Suisse v. United States Dist. Court*, 130 F.3d 1342, 1345-46 (9th Cir. 1997).

e. The October 8, 2004 order imposing Rule 11 sanctions and staying the proceedings in a parallel federal action. *See Hill v. MacMillan / McGraw Hill Sch. Co.*, 102 F.3d 422, 424 (9th Cir. 1996) (recognizing that Rule 11 sanctions orders are not generally appealable*); see also Privitera v. Cal. Bd. of Med. Quality Assur.*, 926 F.2d 890, 892 (9th Cir. 1991)(noting that a stay order may be appealable if ordered in connection with the denial of a preliminary injunction). This case does not meet the requirements for a writ of mandamus. *See Bauman*, 557 F.2d at 654-55. Neither was the stay imposed in connection with a preliminary injunction, because no substantive relief was granted. *See Carson v. Am. Brands, Inc.*, 450 U.S. 79, 89-90, 67 L. Ed. 2d 59, 101 S. Ct. 993 (1981).

2. The court acted within its authority when it entered the contempt order. *See F.J. Hanshaw Enterprises, Inc. v. Emerald River Dev. Inc.*, 244 F.3d 1128, 1136-37 (9th Cir. 2001). Appellants' challenge to the contempt order under the Anti-Injunction Act is precluded by the collateral bar rule. *See In re Establishment Inspection of Hern Iron Works, Inc.*, 881 F.2d 722, 725-26 (9th Cir. 1989). Appellants had sufficient notice of the contemplated contempt finding. *See United States v. Rylander*, 714 F.2d 996, 1004 (9th Cir. 1983). The portion of the contempt order prohibiting the filing of any additional lis pendens is not appealable as a preliminary injunction, because it granted no indefinite or

permanent substantive relief. See Carson, 450 U.S. at 89-90.

3. The district court properly applied the *Rooker-Feldman* doctrine to dismiss Appellants' challenge to the state court's disqualification of Frederic Sanai as counsel for Viveca Sanai. *See Mothershed v. Justices of the Supreme Court,* 410 F.3d 602, 606-07 (9th Cir. 2005)(noting lack of jurisdiction over challenges to "state-court losers complaining of injuries caused by state court judgments rendered before the district court proceedings commenced.")(citations omitted). *Rooker-Feldman* applies to the interlocutory orders at issue in this case. *See id. n.3, see also Doe and Assocs. Law Offices v. Napolitano,* 252 F.3d 1026, 1030 (9th Cir. 2001). The non-party doctrine articulated in *Johnson v. De Grandy,* 512 U.S. 997, 129 L. Ed. 2d 775, 114 S. Ct. 2647 (1994), does not apply in this case where Frederic personally litigated the issue of his disqualification.

4. In view of the ongoing state proceedings, the district court properly abstained under *Younger v. Harris,* 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971), from deciding Appellants' application for a TRO/motion for preliminary injunction. *See H.C. v. Koppel,* 203 F.3d 610, 613 (9th Cir. 2000). The fact that the outcome of the state proceedings is adverse does not mean that the opportunity to litigate is inadequate.

5. Reassignment to a different judge is not warranted. A judge's expression of impatience, annoyance or anger does not establish bias. *See*

Liteky v. United States, 510 U.S. 540, 555-56, 127 L. Ed. 2d 474, 114 S. Ct. 1147 (1994).

On remand, the district court is urged to carefully examine its subject matter jurisdiction over this case.

We dismiss the appeal of the interlocutory orders entered in this case. In all other respects, we affirm the district court's rulings.

DISMISSED in part, AFFIRMED in part.

VIVECA SANAI; et al., Plaintiffs - Appellants, v. SASSAN SANAI, Defendant - Appellee. VIVECA SANAI; et al., Plaintiffs - Appellants, v. SASSAN SANAI; et al., Defendants - Appellees. VIVECA SANAI, an individual; et al., Plaintiffs - Appellants, v. JOSEPH THIBODEAU, an individual; et al., Defendants - Appellees. VIVECA SANAI, an individual; et al., Plaintiffs - Appellants, v. SASSAN SANAI, an individual; et al., Defendants - Appellees.

No. 03-35797, No. 03-35932, No. 04-35041, No. 04-35881.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
Before: CANBY, BEEZER, and RAWLINSON, Circuit Judges.

The panel has voted to deny the petitions for rehearing. Judge Rawlinson voted, and Judges Canby and Beezer recommended, to deny the petitions for rehearing en banc.

The full court has been advised of the petitions for rehearing en banc, and no judge of the court has requested a vote.

The petitions for rehearing and rehearing en banc filed on September 7, 2005 are DENIED in all of the above cases.

The request for judicial notice is GRANTED.

No additional filings will be accepted in these consolidated cases.

THE HONORABLE THOMAS ZILLY

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

VIVECA SANAI, an individual; CYRUS SANAI, an individual; FREDRIC SANAI, an individual; INGRID BURON, an individual; and DARIA SANAI, an individual,

Plaintiffs,

vs.

SASSAN SANAI, an individual; MARY McCULLOUGH, an individual; INTERNAL MEDICINE & CARDIOLOGY, INC., a Washington corporation,

Defendants.

CYRUS SANAI, an individual; and FREDRIC SANAI, an individual;

Plaintiffs,

vs.

SASSAN SANAI, an individual; MARY LYNN McCULLOUGH, an individual; INTERNAL MEDICINE & CARDIOLOGY, INC., a Washington corporation; WILLIAM SULLIVAN, an individual; and MARSH MUNDORF PRATT SULLIVAN AND MCKENZIE, a partnership,

Defendants.

ORDER ON DEFENDANT DR. SASSAN SANAI'S MOTION FOR CONTEMPT, SANCTIONS AND ATTORNEY'S FEES

JUDGEMENT SUMMARY NO.1

Judgment Creditor	Sassan Sanai
Judgment Debtors:	Fredric Sanai and Viveca Sanai, jointly and severally
Principal Judgment Amount:	$-0-
Attorney's Fees:	$3400
Attorney for Judgment Creditor:	William R. Sullivan Marsh Mundorf Pratt Sullivan & McKenzie 16504 9th Avenue S.E. Suite 203 Mill Creek, Washington 98012

Attorney for Judgment Debtors: Pro Se
Principal Judgment Amount
Shall bear interest at Federal interest,

ORDER

This Matter having come on before the court upon the motion of Defendant, Dr. Sassan Sanai, for contempt, sanctions and attorney's fees; and the court having reviewed the files and records herein and being fully advised on the premises, NOW, THEREFORE,

IT IS HEREBY ORDERED ADJUDGED AND DECREED AS FOLLOWS

1. Fredric Sanai and Viveca Sanai shall be and are hereby found to be in contempt of this court for their conduct in continuing to obstruct, hinder and delay the sale of the vacant lot and specifically be recording a lis pendens in Snohomish County under Auditor's File No. 200305200939 and an amended lis pendens under Auditor's File no. 200207070619, all in violation of this Court's Order of May 15, 2003.

2. As a coercive sanction, neither Fredric Sanai nor Viveca Sanai shall be allowed to file or record any further notices of lis pendens affecting either the vacant lot of the parties or the former family home without prior Order of the court approving the same following a hearing pursuant to which the due

process notice in accordance with the FRCP and the Local rules of the U.S. District Court for the Western District of Washington has been provided.

3. None of the plaintiffs herein shall file or record any additional or further notices of lis pendens affecting the former family home of the parties without prior Order of the court approving the same following a hearing pursuant to which the due process notice in accordance with the FRCP and the Local Rules of the U.S. District Court for the Western District of Washington has been provided.

4. [DELETED.]

5. Defendant, Dr. Sassan Sanai, is awarded a judgment for attorney's fees in the amount of $3400 against Fredric Sanai and against Viveca Sanai, jointly and severally as a remedial and compensatory measure an/or as sanctions. This sanction must be paid within 10 days.

6. $2500 additional sanctions to be paid into the registry of the court within 10 days.

DONE IN OPEN COURT this 26th day of September, 2003

/s/
Judge Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

VIVECA SANAI and FREDRIC SANAI, Plaintiffs, v. GEOFFREY CROOKS, et al., Defendants.	CASE NO. C03-2781C ORDER

This matter comes before the Court on Plaintiffs' motion for summary judgment (Dkt. No. 20), Defendants' cross-motion to dismiss (Dkt. No. 29), and Plaintiffs' second motion for a preliminary injunction/temporary restraining order (Dkt. No. 32). The Court has carefully considered the papers submitted by the parties and determined that oral argument is not necessary. For the reasons explained below, the Court finds that it lacks subject matter jurisdiction over Plaintiffs' claims under the *Rooker-Feldman* doctrine. Accordingly, the Court GRANTS Defendants' motion to dismiss and DENIES Plaintiffs' motions for summary judgment and a preliminary injunction/temporary restraining order.

I. BACKGROUND

The facts pertinent to adjudication of the current

motions have been sufficiently laid out in the Court's Order of September 24, 2003 denying Plaintiffs first motion for a preliminary injunction/temporary restraining order (Dkt. No. 14). Those facts are simple and uncontroverted.

Plaintiffs Viveca Sanai and her son, Fredric Sanai,[1] brought this lawsuit under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Plaintiffs challenge the constitutionality of the several decisions of the Washington state courts judges that have disqualified Fredric, an attorney admitted to practice law in the state of Washington, from representing Viveca in a marriage dissolution action currently pending before the Washington Court of Appeals. Specifically, Viveca alleges that by disqualifying Fredric "for reasons, . [that] cannot be found in any rule or case" Defendants have violated her right to counsel of choice guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. (*See* Pls.' Summ. J. Mot. at 1.) Fredric challenges the same disqualification' orders arguing that they have deprived him of a right to practice law in violation of constitutional due process.[2] The following paragraphs summarize the proceedings in the Washington state courts during which Plaintiffs have allegedly suffered deprivation of their constitutional rights.

On April 12, 2002, the Snohomish County

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[1] Identically to the Court's September 24, 2003 Order, for the sole purpose of convenience, this Order will further address Viveca Sanai and Frederic Sanai by their first names.

[2] Both Plaintiffs also challenge the state judges' rulings as violating their constitutional equal protection rights.

Superior Court issued a final decree dissolving the marriage between Viveca and Sassan Sanai. Both parties appealed the decree to the Washington Court of Appeals, Division One.[3] Although Fredric did not represent Viveca at the trial court level, he became one of Viveca's attorneys on appeal. Viveca also utilized Fredric to represent her in a proceeding on her motion to vacate the final judgment that she had initiated in the Snohomish County Superior Court.

On September 27, 2002, Defendant Thibodeau, a judge of the Snohomish County Superior Court, signed an order disqualifying Fredric from representing Viveca in the proceeding to vacate the final judgment. In Judge Thibodeau's view, it was improper for Fredric to continue to represent Viveca because of Fredric's involvement in the case as a potential witness and for a conflict of interests reason. On March 11, 2003, the Washington Court of Appeals, Division One, determined that the disqualification order was not appealable as of right and did not merit the court's discretionary review. When Fredric sought discretionary review of file Court of Appeals' ruling in the Washington Supreme Court, Defendant Geoffrey Crooks, the Washington Supreme Court Commissioner, provided Fredric with the opportunity to present a written argument as to

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[3] This appeal is still pending in the Washington Court of Appeals which heard the parties' oral arguments in the case on September 25, 2003. Per Plaintiffs' assertion, the Court of Appeals is inclined to remand the case back to the Snohomish County Superior Court for further proceedings. (See Pls.' 2d Mot. For Prelim. Inj. At 2.)

whether Fredric had the authority to represent Viveca in the appellate proceedings. (See Pls. 1st Mot. For Prelim. Inj. Ex. I.) Having considered Fredric's brief on the issue, Commissioner Crooks issued a written ruling analyzing Judge Thibodeau's disqualification order and concluding that Fredric should not be entitled to represent Viveca in her petition for discretionary review of the order. Accordingly, Commissioner Crooks declined to consider any papers submitted by Fredric on Viveca's behalf and denied Viveca's motion for discretionary review.

Disappointed with the state courts' decisions at both trial and appellate levels, Plaintiffs turned to this Court, having framed their challenges to Judge Thibodeau's disqualification order as § 1983 claims for violation of constitutional rights. In their current motion for summary judgment, Plaintiffs request that the Court enjoin Defendants from enforcing the orders disqualifying Fredric from representing Viveca in her pending marriage dissolution action. In addition, Plaintiffs insist that the Court enjoin Defendants from enforcing any other orders prejudicial to Viveca that were issued in the marriage dissolution action on or after September 27, 2002, i.e., the day on which Judge Thibodeau disqualified Fredric. Plaintiffs' request for an injunction, however, is not warranted because it presents a functional equivalent of an appeal of decisions made by state courts. As demonstrated below, this Court is not a proper forum for such appellate challenge.

II. ANALYSIS

A. Legal Standard For The *Rooker-Feldman* Doctrine

The power of lower federal courts to adjudicate claims arising under the Constitution and laws of the United States is not absolute; in certain cases it is subject to limitations imposed by statutes and judge-made doctrines. The *Rooker-Feldman* doctrine presents one such limitation. It disallows lower federal courts to bear appeals from the decisions of state courts and to issue rulings upon federal law claims that effectively alter state court decisions. *See generally Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923); *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983). The United States Supreme Court has formulated the current scope of the doctrine as follows:

> If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for [relief], then the District Court is in essence being called upon to review the state court decision. This the District Court may not do.

Feldman, 460 U.S. at 483 n.16. The Supreme Court further clarified the contours of the doctrine as banning review of state court decisions, but leaving general challenges to constitutionality of state laws and regulations unaffected:

> United States District Courts, therefore, have subject matter jurisdiction over

> general challenges to state [law], . . . which do not require review of a final state court judgment in a particular case. They do not have jurisdiction, however, over challenges to state court decisions in particular cases arising out of judicial proceedings *even if those challenges allege that the state court's action was unconstitutional.* Review of those decisions may be had only in this Court.

Id. at 486 (emphasis added).

In *Bianchi v. Rylaarsdam*, a recent Ninth Circuit opinion involving facts similar to the facts of the case at bar, the court thoroughly explained the essence of the *Rooker-Feldman* jurisdictional limitation:

> *Rooker-Feldman* is a powerful doctrine that prevents federal courts from second-guessing state court decisions by barring the lower federal courts from hearing de facto appeals from state-court judgments [4] If claims raised in the federal court

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[4] Plaintiffs' argue that the Rooker-Feldman doctrine strips a federal district court of the subject matter jurisdiction exclusively over appeals of state courts' final judgments. (Pls.' Summ. J. Reply at 4.) This argument misinterprets the Ninth Circuit case law, according to which the *Rooker-Feldman* doctrine bars a federal district court's collateral review of all state court decisions, including nonappealable interlocutory orders. *See G. C. & K.B. Invs., Inc. v. Wilson*, 326 F.3d 1096, 1103 (9th Cir. 2003); *Doe & Assocs. Law Offices v. Napolitano*, 252 F.3d 1026, 1030 (9th Cir. 2001).

> action are `inextricably intertwined' with the state court's decision such that the adjudication of the federal claims would undercut the state ruling or require the district court to interpret the application of state laws or procedural rules, then the federal complaint must be dismissed for lack of subject matter jurisdiction. Simply put, `the United States District Court, as a court of original jurisdiction, has no authority to review the final determinations of a state court in judicial proceedings.'

334 F.3d 895, 898 (9th Cir. 2003) (internal citations omitted).

The *Bianchi* court indicated that in the context of the *Rooker-Feldman* doctrine, a plaintiff's freshly alleged federal claims are "inextricably intertwined" with the claims upon which a state court had already ruled if the adjudication of the federal claims would require the federal district court to interpret and apply the pertinent state law anew. *See id.* Importantly, the court held that *Rooker-Feldman* operates to bar lower federal courts from adjudicating even those federal law claims that have not been decided by a state court if by bringing such claims the losing party in the state court merely seeks to alter the state court's decision with respect to the latter. In other words, if the injury alleged by the federal plaintiff stemmed from the state court judgment itself, a federal district court has no subject matter jurisdiction over the plaintiff's constitutional challenge to that judgment. *Id.* Thus, the plaintiffs'

new federal claims are "inextricably intertwined" with the issues adjudicated in the state court if by alleging the former the plaintiff hopes to change the state court's decision with respect to the latter. Again, the language of the Bianchi opinion succinctly explains that point:

> [U)nlike res judicata, the *Rooker-Feldman* doctrine is not limited to claims that were actually decided by the state courts, but rather it precludes review of all `state court' decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional.' Stated plainly, '*Rooker-Feldman* bars any suit that seeks to disrupt or `undo' a prior state-court judgment, regardless of whether the state-court proceeding afforded the federal-court plaintiff a full and fair opportunity to litigate her claims.'

Id. at 901 (internal citations omitted); *See also Napolitano,* 252 F.3d at 1030 (9th Cir. 2001) ("Where the district court must hold that the state court was wrong in order to find in favor of the plaintiff, the issues presented to both courts are inextricably intertwined.").

Federal courts have held that *Rooker-Feldman's* jurisdictional bar applies in cases where a de facto appeal of a state court's decision is framed as a federal constitutional claim under 42 U.S.C. § 1983. *See Bianchi,* 334 F.3d at 898-99; *Gentner v.*

Shulman, 55 F.3d 87, 89 (2d Cir. 1995); *Worldwide Church of God v. McMair*, 805 F.2d 888, 893 n.4 (9th Cir. 1986); *see also Hale v. Harney*, 786 F.2d 68E 691 (5th Cir. 1986) ("[I.]itigants may not obtain review of state court actions by riling complaints about those actions in lower federal courts cast in the form of civil rights suits."). For example, in *Bianchi*, a state court litigant, who had unsuccessfully sought to vacate a decision by the California Court of Appeal in the California Supreme Court, brought a civil rights action under 42 U.S.C. §§ 1982 and 1988 in a federal district court. The plaintiff argued that the decision of the Court of Appeal violated his due process rights guaranteed by the U.S. Constitution because one of the judges who had issued the decision allegedly should have been disqualified from the panel. *Bianchi*, 334 F.3d at 897. Plaintiff sought a declaratory judgment pronouncing the judge's presence on the panel unconstitutional and "a mandatory injunction to require the [d]efendants to recall the [decision] issued ... and the resetting of that matter for argument and decision after transfer of that case to a different division ... of the [state appellate court]" *Id. at* 897-98. The Ninth Circuit held that the federal district court had properly dismissed the plaintiff s civil rights claim under the *Rooker-Feldman* doctrine. *Id.* at 898-99.

Having explained the gist of the *Rooker Feldman* rule, the court determined that the plaintiffs' claim did not amount to a general constitutional challenge to a state law or practice, but in essence asked the .federal district court to grant the plaintiff the same individual remedy he was denied in state court.

Bianchi, 334 F.3d at 898. The plaintiff's constitutional claim sought exclusively to overturn the state court's decision and thus presented a functional equivalent of an appeal of that decision. *Id.* at 896. As such, this particular challenge to an adjudication against Plaintiff in state court was barred by *Rooker-Feldman*. *Id.* at 900.

Likewise, in *Gentner v. Shulman*, the Second Circuit held that the *Rooker-Feldman* doctrine precluded a federal district court from considering the merits of the plaintiffs' § 1983 challenge of the state court decision. Importantly, the facts in Gentner were nearly identical to the facts of the instant case. There, the defendants, presiding judges of various courts of the state of New York, disqualified certain attorneys from representing their clients in several criminal actions filed against the clients in state courts. *Gentner*, 55 F.3d at 88. Unhappy with the judges' rulings, the clients and their disqualified lawyers sued the judges in a federal district court asserting violation of their constitutional rights under the Sixth and Fourteenth Amendments. Id. Just as Viveca and Fredric do in this case, the plaintiffs in *Gentner* sought an injunction prohibiting the state court judges from enforcing their disqualification orders. *Id.*

Having found that the plaintiffs' constitutional claims in essence amounted to an appeal of the state court disqualification orders, the Second Circuit dismissed those claims explaining that "under [the *Rooker-Feldman*] doctrine, federal district courts lack jurisdiction to review state court decisions *whether final or interlocutory in nature.*" *Id.* at 89 (emphasis

added). The court noted that dismissal of the plaintiffs' federal law claims did not leave them without a remedy. In fact, the plaintiffs aggrieved ;I with the allegedly wrongful disqualification decisions could seek reversal of their potential convictions on direct appeal from the state court's eventual final judgment. *Id.* However, review of the disqualification orders by a federal court would amount to an improper by-passing of the state appellate procedure:

> Permitting [the plaintiffs] to secure relief in [a federal court] would be to give them greater standing than they would have in state appellate courts or than an attorney disqualified in a United States District Court criminal case would have in a United States Court of Appeals.

Id.

As the following discussion demonstrates, Plaintiffs' constitutional claims in the instant case are no different from the disguised appeals from the state court decisions in *Bianchi* and *Gentner.* Hence, the Court lacks jurisdiction to reach the merits of the claims.

B. Application of The *Rooker-Feldman* Doctrine to Plaintiffs' Claims

In this case, Viveca alleges that by disqualifying Fredric from representing her in a post judgment proceeding, Defendants have deprived her of the constitutional tight to retain counsel of her choice guaranteed by the Fifth and Fourteenth Amendments. Ingenuously looking at

his disqualification from a personal perspective, Fredric claims that Defendants' disqualification orders also violated his right to practice law guaranteed by the Due Process clauses of the Fifth Amendment and Fourteenth Amendment and the Equal Protection clause of the Fourteenth Amendment. At the heart of Plaintiffs' claims lies an allegation that Defendants acted arbitrarily in not allowing Fredric to represent Viveca in state courts. As Plaintiffs' briefs conspicuously demonstrate, that allegation could be addressed only by analyzing whether each Defendant's ruling disqualifying Fredric was justified by the Washington Rules of Professional Conduct.[5] However, before disqualifying Fredric, Defendants, judges of the Washington state courts, had already concluded that Fredric's further representation of Viveca contravenes the ethical rules established for

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[5] As part of their argument in support of the current motion for summary judgment Plaintiffs assert that "the existing case law prohibit[s] the disqualification of attorneys based on actions which violate no ethical rule." (Pls.' Summ. J. Mot. At 9.) Plaintiffs further maintain that "in the case of attorneys, a court or bar association may not disqualify or discipline an attorney except for clear violations of the rules of professional responsibility or knowing violation of a court order." (Id. at 6-7.) In fact, the leading theme that permeates Plaintiffs' constitutional claims is that not a single ethical rule adopted in Washington required Fredric's disqualification. To prove that theory, Plaintiffs engage in a lengthy and detailed scrutiny of Defendants' rulings under the Washington Rules of Professional conduct. (See Pls.' Mot. Summ. J. at 11-17.)

lawyers practicing in Washington. Thus, to resolve Plaintiffs' constitutional claims, the Court has no other avenue but to engage in reviewing the decisions of the Washington state courts with respect to the application of the Washington ethical rules to Fredric's representation of Viveca. The *Rooker-Feldman* line of cases squarely precludes such review by this Court. *See Wilson*, 326 F.3d at 1103.

Plaintiffs' constitutional claims are "inextricably intertwined"[6] with the challenged rulings of the state court judges in an exemplary way. First, as noted above, adjudication of Plaintiffs' claims would require this Court to interpret and apply the

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[6] Plaintiffs argue that *Rooker-Feldman* does not apply in this case because Judge Thibodeau's order disqualifying Fredric from representing Viveca was not "inextricably intertwined" with the prior final judgment in Viveca's marriage dissolution case. This argument reveals either Plaintiffs' fundamental misunderstanding of the term "inextricably intertwined" within the meaning of the *Rooker-Feldman* doctrine or their deliberate attempt to obfuscate the issues before the Court. In fact, according to the Supreme Court, a federal district court may not rule upon constitutional claims before it if those claims "are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for [relief]. " *Feldman*, 460 U.S. at 483 n.16. Thus, for the purpose of applying the *Rooker-Feldman* rule, the Court must scrutinize the relationship between Plaintiffs' current constitutional claims and the state courts decisions that have allegedly injured Plaintiffs. The relationship between the orders disqualifying Fredric and the final judgment it Viveca's marriage dissolution case is irrelevant to the *Rooker-Feldman* jurisdictional analysis.

Washington Rules of Professional Conduct anew. Second, Plaintiffs' current federal constitutional claims are aimed exclusively at overturning Defendants' disqualification orders. Third, in order to grant Plaintiffs their requested relief, the Court must hold that the state courts' decisions in question were erroneous. Clearly, the only redress Plaintiffs seek is "an undoing' of the prior state-courts [orders] - a particularized challenge to an adjudication against [them] in state court[s] [that is] clearly barred under *Rooker-Feldman*," *Bianchi*, 334 F.3d at 900 (internal quotation marks omitted).

As a last resort, Plaintiffs argue that the *Rooker-Feldman* doctrine cannot bar Fredric's claim for deprivation of the right to practice law because he was not a party to Viveca's marriage dissolution proceedings and therefore was unable to appeal the orders disqualifying him from representing Viveca. This argument has merit only insofar as it points to *Rooker-Feldman's* general underlying premise that a litigant aggrieved by a state court decision should have an opportunity to appeal that decision through the state court system, with a subsequent potential discretionary review of the implicated issues of federal law by the United States Supreme Court. However, as applied to the facts of the instant case, Plaintiffs' argument is flawed for two reasons. First, it appears that Washington courts allow attorneys to seek review of trial courts' orders disqualifying them from representing their clients. *See, e.g., In re Estate of Barovic*, 946 P.2d 1202, 1204 (Wash. Ct. App. 1997) (the Washington Court of Appeals granted the attorney's petition for

discretionary review of a trial judge's order disqualifying the attorney from representing his deceased client). In fact, in an oral ruling disqualifying Fredric, Judge Thibodeau expressly mentioned that he expected Fredric to seek discretionary review of his ruling in the Court of Appeals. (*See* Pls.' 1st Mot. For Prelim Inj, Ex. D at 65.) In addition, Defendant Crooks, Commissioner o£ the Washington Supreme Court, had provided Fredric with an opportunity to present a written argument on the issue of whether Fredric was properly disqualified by Judge Thibodeau, which Fredric did. (*Id.* at Exs. 1, J.) Thus, it appears that Fredric, although technically not a party to his former client's case, had an opportunity to appeal his disqualification decision through a state court system.

Second, Fredric's constitutional claim at issue requests relief identical to the relief that Viveca, a party to the marriage dissolution litigation, sought to obtain on discretionary review of Fredric's disqualification order, namely allowing Fredric to continue representing Viveca. Thus, in a practical sense, Viveca's petition for discretionary review of the order disqualifying Fredric served also as Fredric's petition. Both Fredric's and Viveca's current constitutional claims depend solely upon resolution of the single issue of whether Defendants properly disqualified Fredric under the then - effective Washington Rules of Professional Conduct. Accordingly, Fredric's federal constitutional claim may not pass *Rooker-Feldman's* jurisdictional threshold because that claim can be fully resolved

by Viveca's potential appeal of the final judgment in her state court action.

In sum, Plaintiffs' attempt to obtain review of unfavorable decisions of the Washington state courts by wrapping their state law-based challenges in the fabric of federal constitutional claims mast fail under the *Rooker-Feldman* doctrine.[7] The fact that Plaintiffs did not present, although they could have, their current constitutional arguments to the state court judges does not alter the application of *Rooker-Feldman's* jurisdictional bar. As the Ninth Circuit has expressly stated:

> The *Rooker-Feldman* doctrine does not require [a federal court] to determine whether or not the state court fully and fairly adjudicated the constitutional claim.... [The doctrine] bars any suit that seeks to disrupt or `undo' a prior state-court judgment, regardless of whether the state-court proceeding afforded the federal-court plaintiff a full and fair opportunity to litigate her claims.

Bianchi, 334 F.3d at 900. In addition, while Plaintiffs' petitions for discretionary review of Judge

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[7] The conclusion that this Court has no jurisdiction over Plaintiffs' claims under the *Rooker-Feldman* doctrine obviates the need for the Court to address Defendants' argument that they enjoy protection of absolute judicial immunity.

Thibodeau's order disqualifying Fredric have been denied by the Washington Court of Appeals and the Washington Supreme Court, Plaintiffs may still present their constitutional challenges to the disqualification on appeal of the prospective final judgment in Viveca's marriage dissolution case. *See State v. WWJ Corp.*, 980 P.2d 1257, 1260 (Wash. 1999) (holding that parties in civil cases may raise constitutional issues for the first time on appeal). Permitting Plaintiff's to obtain their requested relief in this Court would mean to entitle them to a standing greater than they had in the Washington appellate courts. *See Gentner*, 55 F.3d at 89. The *Rooker-Feldman* doctrine was specifically designed to preclude such anomaly.

4. CONCLUSION

The Court hereby GRANTS Defendants' cross-motion to dismiss (Dkt. No. 29) and dismisses all of Plaintiffs' claims against Defendants with prejudice. The Court DENIES Plaintiffs' motion for summary judgment (Dkt. No. 20) and the second motion for a preliminary injunction/temporary restraining order (Dkt. No. 32).

SO ORDERED this 12th day of December, 2003

/s/ _____

CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE
VIVECA SANAI, an individual; CYRUS SANAI, an individual; and FREDRIC SANAI, an individual,
Plaintiffs,
v.
SASSAN SANAI, an individual; MARY LYNN McCULLOUGH, an individual; WILLIAM SULLIVAN et ux, an individual; MARSH MUNDORF PRATT SULLIVAN AND MCKENZIE, a corporation; PHILIP MAXEINER et ux, an individual; and DOES 1-10,

No. C04-1594Z

MINUTE ORDER

The following Minute Order is made by direction of the Court, the Honorable Thomas S. Zilly, United States District Judge:

(1) Plaintiff's ex parte motion for a temporary restraining order and motion for preliminary injunction, docket no. 14, is DENIED.

(2) The Court has entered an order STAYING these proceedings pending the trial and final disposition of plaintiffs' parallel matter before the Court, case no. C02-2165Z. Plaintiffs are ORDERED not to file any further pleadings in this matter until the stay is lifted by the Court.

(3) The Clerk is directed to send a copy of this Minute Order to all counsel of record.

Filed and entered this 8th day of October, 2004.
BRUCE RIFKIN, Clerk
/s/ Casey Condon
By
Casey Condon
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE
VIVECA SANAI, an individual; CYRUS SANAI, an individual; and FREDRIC SANAI, an individual,
Plaintiffs,
v.
SASSAN SANAI, an individual; MARY LYNN McCULLOUGH, an individual; WILLIAM SULLIVAN et ux, an individual; MARSH MUNDORF PRATT SULLIVAN AND MCKENZIE, a corporation; PHILIP MAXEINER et ux, an individual; and DOES 1-10,
No. C04-1594Z
ORDER

BACKGROUND

Plaintiffs Cyrus Sanai, Viveca Sanai, and Fredric Sanai are parties in two matters pending before this Court, C02-2165Z and C04-1594Z. Plaintiffs filed this case, C04- 1594Z, after the Court denied plaintiffs' motion to file a Fourth Amended Complaint in C02-2165Z. See Sanai v. Sanai, No. C02-2165Z, Minute Order, docket no. 501.

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[P]laintiffs filed a combined ex parte motion for temporary restraining order and motion for preliminary injunction against Philip Maxeiner. The Court denied plaintiffs ex parte motion for a temporary restraining order against Philip Maxeiner, and denied plaintiffs motion for a preliminary injunction. See Minute Order, docket no.

16.

Plaintiffs' motion, docket no. 23, now requests relief in two forms. First, plaintiffs request the Court grant supersedeas without bond. Second, plaintiffs request the Court grant an injunction pending appeal. Plaintiffs do not cast their motion for an injunction pending appeal as a motion for reconsideration; however, the Court notes that the facts, argument, and legal principles relied upon are the same as in plaintiffs' original motion for temporary restraining order and for preliminary injunction, docket no. 14. The Court denies this renewed request for an injunction, docket no. 23, on the same grounds.

DISCUSSION

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B. Injunction Pending Appeal.

As in plaintiffs' original motion for temporary restraining order and for preliminary injunction, docket no. 14, plaintiffs again request that the Court grant an injunction, or stay pending appeal, to prevent Philip Maxeiner from performing his duties as a court appointed referee in the ongoing Sanai divorce proceedings in Snohomish County Superior Court. The record indicates that Maxeiner is acting at the direction of the state court and is in the process of selling the Sanai's former home, as part of the divorce proceedings. In determining whether or not to grant a stay, the Court considers the following factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the

stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Hilton v. Braunskill,* 481 U.S. 770, 776 (1987). A preliminary injunction is available to a party that demonstrates: (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor. *Sammartano v. First Judicial Dist. Court,* 303 F.3d 959, 965 (9th Cir. 2002) (*citing A&M Records, Inc. v. Napster, Inc.,* 239 F.3d 1004, 1013 (9th Cir. 2001) (internal quotation omitted)). In order to evaluate whether a preliminary injunction should be granted, the district court must examine the potential merits of the asserted claims and the harm or hardships faced by the parties. *Sammartano,* 303 F.3d at 965. The Ninth Circuit has held that "these two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Id.* (*citing A&M Records*, 239 F.3d at 1013). The two alternatives represent two extremes on a single continuum. *Sun Microsystems, Inc. v. Microsoft Corp.,* 188 F.3d 1115, 1119 (9th Cir. 1999). The Court's evaluation of the alternatives is such that where the movant "has a 100% probability of success on the merits," the movant is entitled to a preliminary injunction without regard to the balance of the hardships. *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1102
(9th Cir. 1998).

1. Irreparable harm and probable success on the merits.

Pursuant to the divorce proceedings in state court,

the family home will be sold by the court appointed referee, Maxeiner. Plaintiffs assert that once sold, the family home will be "razed" by the new owners, and thus the sale constitutes irreparable harm. The Court does not reach the issue of irreparable harm because plaintiffs have not provided facts to support probable success on the merits.

Absent extraordinary circumstances, federal courts may not enjoin or otherwise interfere with pending state court proceedings that are allegedly unconstitutional. In evaluating plaintiffs' potential for probable success on the merits, the Court must evaluate whether abstention is appropriate under the doctrine established in *Younger v. Harris*, 401 U.S. 37 (1971). Younger abstention is appropriate if (1) there are ongoing state judicial proceedings, (2) the proceedings implicate important state interests, and (3) there is an adequate opportunity in the state proceedings to raise federal questions. *Dubinka v. Judges of the Superior Court*, 23 F.3d 218, 223 (9th Cir. 1994); *Gartrell Constr., Inc. v. Aubry*, 940 F.2d 437, 441 (9th Cir. 1991).

Plaintiffs concede that (1) there are ongoing state judicial proceedings; and (2) the proceedings implicate important state interests. Thus, the only question before this Court is whether there is an adequate opportunity in the state proceedings to raise federal questions. If the Court finds that there is an adequate opportunity in the state proceedings to raise federal questions, *Younger* abstention is appropriate and plaintiffs' motion for a preliminary injunction must be denied. Plaintiffs argue that there is no adequate opportunity to present their constitutional challenges in the state proceedings

because Judge Baker has refused to recuse himself. Plaintiffs assert that Judge Baker was a member of a law firm used by defendant Sassan Sanai. Sassan used the firm until 1988, and Judge Baker was a member of the firm until 1990. Plaintiffs argue that because Judge Baker continues to refuse to recuse himself, the appearance of fairness doctrine has been violated, which infects the actions of the tribunal.

However, even if these facts are true, plaintiffs have failed to meet their burden. Plaintiffs must show more than a fifteen-year old association between parties to establish the inadequacy of state court proceedings. Plaintiffs also assert that Maxeiner's appointment as a referee violates Viveca Sanai's right of equal protection under state law and her constitutional right to due process. However, the Court can find no indication that Viveca Sanai has not had an adequate opportunity in the state proceedings to raise these federal questions.

The Court has reviewed the materials submitted by plaintiffs from their state court divorce proceedings. The motions, pleadings, and rulings of the state courts, as well as the additional declarations and materials submitted by plaintiffs, do not support plaintiffs' allegations and contain no evidence of bias or improper conduct. The Court finds no support in the record for plaintiffs' argument that they have been deprived of an adequate opportunity in the state proceedings to raise federal questions.

2. Serious questions and the balance of hardships.

Alternatively, plaintiffs may be entitled to a preliminary injunction if they demonstrate that

serious questions are raised and the balance of hardships tips in plaintiffs' favor. *Sammartano,* 303 F.3d at 965.

For the reasons stated above, the Court determines that plaintiffs have not demonstrated that serious questions are raised regarding the state court proceedings. Plaintiffs have not demonstrated facts that show an adequate opportunity in the state proceedings to raise federal questions. Plaintiffs have put forth no evidence that the state court proceedings are improper in any way, and the Court cannot find that plaintiffs have raised serious questions regarding the merits of those proceedings. Thus, plaintiffs have not demonstrated facts that would lead this Court to decline abstention under *Younger.* Even if this Court were to make the assumption that the sale of the family home by the Snohomish County Superior Court would cause the balance of hardships to tip in plaintiffs' favor, that determination would not change the outcome here. Plaintiffs are not entitled to a preliminary injunction pending appeal because they have not raised serious questions about the state court proceedings.

....

DATED this 26th day of October 2004.

/s/ Thomas S. Zilly

THOMAS S. ZILLY
United States District Judge

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

There is no relevant statutory basis for the collateral bar rule. The Fifth Amendment to the U.S. Constitution provides in relevant part: "[N]or shall any person...be deprived of life, liberty, or property, without due process of law." U.S. Const., Amend. V, § 1.

The Fourteenth Amendment to the U.S. Constitution is relevant to all three questions presented to this Court, and provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, § 1.

The statute governing the appealability of an interlocutory order is 28 U.S.C. §1292(a)(1), which states in relevant part:

> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> > (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or

> dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court....

The *Rooker-Feldman* doctrine derives from 28 U.S.C. §1257, which reads as follows:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

42 U.S.C. §1983 reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(2)

Supreme Court, U.S.
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No. 05-991

In The Supreme Court of the United States

VIVECA SANAI, CYRUS SANAI, and FREDRIC SANAI,

Petitioners,

v.

SASSAN SANAI, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED

(1) Was the Ninth Circuit Court of Appeals in substantial conformity with the other federal circuits in determining that the collateral bar doctrine does not allow review of the contempt order where that order was for civil rather than criminal contempt?

(2) Did the Ninth Circuit comport with the decisions of this Court and other circuits in holding that the May 15, 2003 Order Releasing a *Lis Pendens* was not appealable as an injunction because the order did not meet the requirement of appealability under 28 U.S.C. § 1292(a)(1)?

(3) Respondents do not address the *Rooker-Feldman* doctrine because the respondents herein are not parties to that action.

(4) Respondents do not address the *Younger* Abstention Doctrine because, again, they are not parties to that action.

PARTIES TO THE CASE

Respondents in the consolidated appeals, 03-35797 and 03-35932 do not dispute the description of the parties to the case by Petitioners.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Internal Medicine & Cardiology, Inc. ("IMC") is a Washington for-profit corporation. IMC has no parent corporation and 100% of IMC's stock is owned by Sassan Sanai. No publicly traded corporation owns 10% or more of IMC's stock.

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I. BASIS FOR JURISDICTION

Petitioners mistakenly cite 28 U.S.C. § 1257(a) as the basis for jurisdiction herein. That is error as the cited statute pertains to review by writ of certiorari by the Supreme Court, "where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute in any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States . . . " The proper section for jurisdiction is 28 U.S.C. § 1254.

II. STATEMENT OF THE CASE

This appeal arises out of one of the many state and federal lawsuits filed by Petitioner Viveca Sanai and two of the parties' offspring, Fredric and Cyrus Sanai, that arise from the Washington state court divorce between Petitioner Viveca Sanai and Respondent Sassan Sanai. Respondent Mary McCullough is Dr. Sanai's medical assistant. Respondents William R. Sullivan and Marsh, Mundorf, Pratt, Sullivan and McKenzie are Dr. Sanai's lawyers. Respondent Internal Medicine and Cardiology, Inc. is Dr. Sanai's medical practice.

In the hearing of May 15, 2003 referenced by petitioners, they materially misrepresent the proceedings in the District Court. Instead, the Court stated:

> I'm going to grant the order. The statute, Sanai's motion to release the lis pendens on the express basis that RCW 4.28.325, permits filing of a notice of lis pendens in a, quote action affecting title to real property at the time of filing a complaint or any time thereafter, end of quote. I'm paraphrasing. But basically, the complaint as

> alleged in the equitable claim is, in my opinion, not an action affecting real property. And I'm just not satisfied that the representations that have been made would support the Court authorizing a lis pendens.
>
> * * *
>
> Well, I'm ordering each of the plaintiffs in this action who I have jurisdiction over to cease and desist from any further action to delay or obstruct the sale of either of those properties or filing any further lis pendens.

ER 199, 240 through 242 (p. 42, l. 24 through p. 43, l. 6; p. 43, l. 24 through p. 44, l. 2).

Petitioner Viveca Sanai acknowledges placement of a notice of *lis pendens* against the same property notwithstanding Judge Zilly's order. Petition at 8. While petitioners provide a partial recitation of matters occurring at the hearing before Judge Zilly on September 26, 2003, that is not part of the record before this Court. *Id.* at 8-9. While petitioners state that the Court acted *sua sponte*, it is plain from the face of the order that it was entered upon the motion of defendant, Dr. Sassan Sanai. Pet. App. C2-3. Further, while petitioners state that the Court found Viveca and Fredric in criminal contempt, the order imposed as a "coercive" sanction a prohibition on Fredric and Viveca against filing or recording further notices of *lis pendens* without prior order of the Court and ordered petitioners Fredric and Viveca to pay Dr. Sanai's attorneys' fees in the amount of $3,400 as a "remedial and compensatory measure and/or as sanctions" and to pay $2,500 in "additional sanctions" to the Court. Pet. App. C3-4.

Petitioner references excerpts of record pertaining to a parallel Ninth Circuit appeal, no. 04-35041, to provide the

"primary grounds" for Viveca filing another *lis pendens*. Petition at 10. Respondents are not party to that appeal and do not have access to the excerpts of record in that case. Petitioners do not allege, however, that the grounds offered by Viveca constitute an excuse or justification for defying Judge Zilly's order prohibiting the filing of additional *lis pendens*. These respondents do not address the course of the litigation between Viveca Sanai and the various judges of the Washington state court system.

III. WHY THE PETITION SHOULD BE DENIED.

A. The September 26, 2003 Order Was a Civil Contempt Order, Not Criminal; Even if it Was Criminal, All Procedural Requirements Were Satisfied.

Petitioners' arguments are based on the incorrect assertion that the $2,500 fine payable to the District Court constituted criminal contempt sanctions. In fact, it was a civil sanction. As this Court held in *International Union United Mine Workers of America v. Bagwell*, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1993), "[S]imilarly, indirect contempts involving discrete, readily ascertainable acts, such as turning over a key or payment of a judgment, properly may be adjudicated through civil proceedings, since the need for extensive impartial fact-finding is less pressing." 512 U.S at 823, 114 S.Ct. at 2560. Here, petitioners admit that Viveca again "placed a notice of *lis pendens* over the same property in a suit continuing the divorce proceedings," Petition at 8. This discrete, readily ascertainable act was properly adjudicated as civil contempt and, along with awarding compensatory attorneys' fees to respondents, the District Court properly assessed the additional $2,500 sanction for civil contempt.

A civil contempt order is not appealable until final judgment has been entered and petitioners do not contend otherwise. Petition at 14. *Carson v. American Brands*, 450 U.S. 79, 85-86, 67 L.Ed.2d 59, 101 S.Ct. 993 (1981); *Union of Professional Airmen v. Alaska Aeronautical Industries, Inc.*, 625 F.2d 881, 883-84 (9th Cir. 1980). Because final judgment has not yet been entered in the consolidated federal action, the sanctions imposed by the September 26, 2003 Order are not yet reviewable.

Even if this Court believes that the $2,500 sanctions amount to petty criminal contempt sanctions, they were still properly assessed in full compliance with due process. *United Mine Workers*, 512 U.S. at 836-37, n. 5, 114 S.Ct. 2562. To be valid, a criminal contempt proceeding must comport with Federal Rule of Criminal Procedure 42(b), which requires such proceedings to be "prosecuted on notice ... stating the essential facts constituting the criminal conduct, and describing it as such." However, federal courts have widely held that the omission of the word "criminal" is not fatal where the notice fully describes the conduct charged, there is no indication that the defendant was confused as to the nature of the proceeding, and the defendant was accorded all procedural rights due in a petty criminal proceeding where the fine is $2,500. *United States v. Rylander*, 714 F.2d 996, 1004 (9th Cir. 1983); *F.T.C. v. Gladstone*, 450 F.2d 193 (5th Cir. 1971); *U.S. v. Pazsgai*, 999 F.2d 719, 735 (3rd Cir. 1993).

B. The Ninth Circuit Properly Found that Petitioners' Attempt to Challenge the Contempt Order Under the Anti-Injunction Act Was Precluded by the Collateral Bar Rule.

Petitioners first argue that the Ninth Circuit's application of the collateral bar rule, both generally and in this specific case, violate this Court's precedent. Plaintiffs are wrong in both respects. The Ninth Circuit's most in-depth discussion of the collateral bar rule is contained in *In re Establishment of Hern Iron Works, Inc.*, 881 F.2d 722 (9th Cir. 1989):

> In brief, the collateral bar rule permits a judicial order to be enforced through criminal contempt even though the underlying decision may be incorrect and even unconstitutional. See *United States v. United Mine Workers*, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947); *Howat v. Kansas*, 258 U.S. 181, 189, 42 S.Ct. 277, 280, 66 L.Ed. 550 (1922). The contemnor cannot ordinarily raise the invalidity of the judicial order as a defense to a contempt charge.
>
> The genesis of the collateral bar rule stems from the widely held belief that a smoothly functioning judicial process may be jeopardized if parties are able to determine for themselves when and how to obey court orders. "The orderly and expeditious administration of justice by the courts requires that 'an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.'" *Maness v. Meyers*, 419 U.S. 449, 459, 95 S.Ct. 584, 591, 42 L.Ed.2d 574 (1975) (quoting *United Mine Workers*, 330 U.S. at 293, 67 S.Ct. at 696). According to this view, although both counsel and litigant

> may exercise their right to object to a court ruling and may vigorously advocate their positions before the appropriate tribunal, both the dignity of the court and the orderly functioning of the judicial system necessitate prompt adherence to the writ of the court.

Hern Iron Works, 881 F.2d at 725-26 (footnotes omitted).

In arguing that the contempt fines imposed by Judge Zilly's September 26, 2003 Order were improper, and that this Court should intervene to address that issue, petitioners argue that *Hern Iron Works* is inconsistent with the case law of other circuits. Petition, at 14-15. They assert that only the Ninth Circuit applies the collateral bar rule where the underlying order was not appealable. In other words, petitioners argue that other circuits' law would permit them to challenge the underlying May 15, 2003 Order as part of their appeal of the September 26, 2003 Order. Petitioners are incorrect.

All of the cases relied upon by petitioners in attacking the Ninth Circuit's application of the collateral bar rule are distinguishable, because, unlike here, they involve criminal contempt. Petitioners rely primarily on *Walker v. City of Birmingham*, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967). *Walker*, however, is inapposite. First, it involved criminal contempt, rather than civil contempt; violation of the underlying order would result, by statute, in jail time. *Walker*, 388 U.S. at 312. Further, *Walker* involved the violation of an injunction. 388 U.S. at 313. Here, the Ninth Circuit determined that the underlying May 15, 2003 Order was not an injunction:

> 1. The following orders are non-final and beyond our jurisdiction to review:

> a. The May 15, 2003 order releasing the *lis pendens*. *See Special Invs., Inc. v. Aero Air, Inc.*, 360 F.3d 989, 993 (9th Cir. 2004). The order is not appealable as an injunction. *See Shee Atika v. Sealaska Corp.*, 39 F.3d 247, 248 (9th Cir. 1994) (describing jurisdiction over orders where the language of 28 U.S.C. § 1292(a)(1) is satisfied).

Pet. App. A2.

Similarly, *United States v. Ryan*, 402 U.S. 530, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971), does not support petitioners' arguments in this case. Rather, *Ryan* merely holds that, in the specific setting of a motion to quash a subpoena duces tecum, an order denying such a motion to quash is not immediately appealable. 402 U.S. at 532. Because the present petition does not concern the denial of a motion to quash a subpoena duces tecum, *Ryan* has no relevance.

Next, petitioners cite to *In re Novak*, 932 F.2d 1397 (11th Cir. 1991). As with the other cases relied upon by petitioners, *Novak* involved a "conviction for criminal contempt", whereas Judge Zilly's September 26, 2003 Order was a finding of civil contempt. See *Novak*, 932 F.2d at 1398. In addition, *Novak* involved the unique factual setting of a non-party's obligation to move to quash an order to personally appear in court. 932 F.2d at 1402. *Novak* does not permit a party to collaterally "attack" a prior court order it violated. *In re Steeley*, 243 B.R. 421, 437 (N.D. Ala. 1999).

Next, petitioners rely on *Matter of Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986). *Providence Journal* involved the clearly distinguishable context of a facially unconstitutional order restraining a newspaper from

publishing certain information. Again, *Providence Journal* concerned criminal contempt, rather than civil. 820 F.2d at 1345. The First Circuit found that none of the bases offered by the trial court justified the restraint. As a result, the First Circuit invoked the "transparently invalid" exception to the collateral bar doctrine, found the restraint unconstitutional, and vacated the order of criminal contempt. 820 F.2d at 1347-49. Here, petitioners' conduct resulting in the finding of contempt involved filing prohibited statutory notices, not "pure speech"; thus, *Providence Journal* does not support petitioners.

Like *Providence Journal*, *State v. Alston*, 256 Kan. 571, 887 P.2d 681 (1994), concerned a newspaper's decision to publish information despite a court order not to publish the information. In addition, *Alston* involved criminal contempt, rather than civil contempt. See 256 Kan. at 588.

Similarly, *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972), arose in the context of a trial court's order that a newspaper not publish certain information. The newspaper violated the order, and a finding of criminal contempt resulted. 465 F.2d at 509. Although the Fifth Circuit found the underlying order constitutionally invalid, it remanded to the trial court to determine if the criminal contempt conviction could still stand. 465 F.2d at 514.

Like the other cases relied upon by petitioners, *Wurpts v. Iowa Dist. Ct. Sioux City*, 687 N.W.2d 286 (Iowa App. 2004), involved criminal contempt rather than civil contempt. Moreover, the *Wurpts* Court did not apply the collateral bar rule in a way that is relevant to the instant matter. Rather, *Wurpts* reversed the contemnor's contempt conviction because the contempt conviction had been based

solely on an unconstitutional statute, 687 N.W.2d at 290-91, which is not at issue here.

United States v. Cutler, 58 F.3d 825 (2nd Cir. 1995) involved a finding of criminal contempt. In *Cutler*, the trial court in a criminal case ordered the parties and their attorneys not to discuss the case with the press. 58 F.3d at 828. In defiance of the trial court's order, an attorney for one of the parties repeatedly spoke to the press regarding the case and the trial court held the attorney in criminal contempt. *Id.* The Second Circuit affirmed, finding that plaintiff could not collaterally attack the underlying order in his appeal of the contempt conviction, because none of the exceptions to the collateral bar rule applied. 58 F.3d at 831-32.

Finally, petitioners cite to *Pina v. Espinoza*, 130 N.M. 661, 29 P.3d 1062 (N.M. App. 2001), a case in which a plaintiff defied a discovery order permitting blanket access to her medical history. The *Pina* court expressly declined to apply the collateral bar rule, because there had been no finding of criminal contempt. 130 N.M. at 669. As a result, *Pina* is inapplicable here.

Respondents do not believe that this Court has jurisdiction to consider petitioners' efforts to challenge Judge Zilly's September 26, 2003 Order, or Judge Zilly's May 15, 2003 Order as part of their challenge to the September 26 Order. Because the May 15, 2003 Order was not appealable, and the September 26, 2003 Order imposed only civil contempt, petitioners' challenges to those orders must await an appeal from the final judgment which will be entered in this consolidated federal action on some future date. Moreover, even if the Court believes it has jurisdiction to consider the petitioners' attack on *Hern Iron Works*,

and the application of *Hern Iron Works* to the facts of this case, this Court should nevertheless decline to grant the petition, because a $2,500 sanction for filing a *lis pendens*, in disregard of the District Court's order does not warrant this Court's involvement. Petitioners have an adequate remedy as part of their anticipated appeal from final judgment in this case.

C. The Ninth Circuit's Decision on Appealability of the *Lis Pendens* Order Follows *Carson v. American Brands, Inc.* and Does Not Constitute a Split Among the Circuits.

Whether or not a split exists among the circuits on the appealability of an order barring a litigant from seeking relief in state court, it is not implicated in the instant matter. Instead, the Ninth Circuit relied on *Carson v. American Brands, Inc.*, 450 U.S. 79, 89-90 (1981) to conclude that the order barring the filing of a *lis pendens* in state court is not appealable as a preliminary injunction, "because it granted no indefinite or permanent substantive relief." Pet. App. A3-4. This Court's holding in *Carson v. American Brands, Inc.* is controlling:

> For an interlocutory order to be immediately appealable under § 1292(a)(1), however, a litigant must show more than that the order has the practical effect of refusing an injunction. Because § 1292(a)(1) was intended to carve out only a limited exception to the final-judgment rule, we have construed the statute narrowly to ensure that appeal as of right under § 1292(a)(1) will be available only in circumstances where an appeal will further the statutory purpose of "permit[ting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable,

> consequence." *Baltimore Contractors, Inc. v. Bodinger, supra*, [384 U.S. 176, 75 S.Ct. 249, 99 L.Ed. 233 (1955)], at 181, 75 S.Ct., at 252. Unless a litigant can show that an interlocutory order of the district court might have a "serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal.

450 U.S. at 84-85, 101 S.Ct. 996-97. Petitioners have not attempted to meet this standard and for that reason their petition should be denied.

Petitioners' extensive analysis of the particular application of this rule in different circuits is inapposite. Specifically, all of the decisions relied upon by petitioners involve a stay or injunction against proceeding in another federal court or in state court. The District Court's temporary and narrowly drawn limitation here does not affect the petitioners' right to proceed in state court but, rather, prohibits them from refiling a statutory *lis pendens* notice in the county auditor's office since Judge Zilly previously addressed their right to do so, found against them and entered an order prohibiting such a filing. Pet. App. C1-4.

The cases relied upon by petitioners from other Circuits do not provide any basis to challenge either Judge Zilly's order or the Ninth Circuit's approval of that order. In *FDIC v. Santiago Plaza*, 598 F.2d 634 (1st Cir. 1979), the Court of Appeals accepted review only because the federal district court ordered the appellant not to proceed in state court and, as such, that the order was clearly appealable under 28 U.S.C. § 1292(a)(1). *Id.* at 635-36.

In *National Equipment Rental, Ltd. v. A.L. Fowler*, 287 F.2d 43 (2nd Cir. 1961), the Court of Appeals accepted

interlocutory review of a case in which two federal courts were attempting to enjoin each other from proceeding in parallel cases that in all material respects were identical. *Id.* at 44-45. In *H.B.E. Leasing Corporation v. Frank*, 48 F.3d 623 (2nd Cir. 1995), an interlocutory appeal was allowed by the Second Circuit from an order granting an injunction requiring defendant to remove mortgage liens on property and provide for the immediate delivery and sale of the mortgaged property, because this injunction provided some or all of the substantive relief sought in plaintiff's complaint. *Id.* at 632-33.

In *Maryland v. Atlantic Aviation Corp.*, 361 F.2d 873 (3rd Cir. 1966), a federal court in New Jersey issued an injunction directing plaintiffs to abstain from all further proceedings in their identical suit in federal court in New York. An interlocutory appeal was granted because leaving the injunction intact would render the parties' proceedings in New York moot. *Id.* at 874.

In *Phillips v. Charles Schreiner Bank*, 894 F.2d 127 (5th Cir. 1990), plaintiff sued his bank and the bank filed suit in Texas state court to foreclose on some of plaintiff's property. Plaintiff obtained an order prohibiting the bank from taking further action in state or federal court to foreclose on any of the properties involved in the suit. The Court of Appeals concluded that this interlocutory injunction was appealable because the District Court was prohibiting proceedings in another court. *Id.* at 130.

In *Guy v. Citizens Fidelity Bank and Trust*, 429 F.2d 828 (6th Cir. 1970), the Court of Appeals accepted review of an order which restrained defendants from prosecuting any action in any court against Citizens Fidelity Bank. *Id.* at 831. Similarly, in *Amsouth Bank v. Dale*, 386 F.3d 763

(6th Cir. 2004), the Court of Appeals distinguished the Third Circuit decision of *Hershey Foods Corp. v. Hershey Creamery Company*, 945 F.2d 1272 (3rd Cir. 1991) and followed the rule that "an order that prohibits a party from pursuing litigation in another forum unquestionably is an injunction for purposes of § 1292(a)(1) . . . " *Id.* at 773.

In *Asset Allocation and Management Company v. Western Employers Insurance Company*, 892 F.2d 566 (7th Cir. 1990), the Court held that interlocutory review of an injunction was available where Asset Allocation and Management Company first filed suit in the Northern District of Illinois and Western then filed suit in California. The Illinois Federal District Court enjoined Western from proceeding with its California suit. The Seventh Circuit found this to be properly reviewable under 28 U.S.C. § 1292(a)(1). *Id.* at 568-69.

In *MAI Basic Four, Inc. v. Basis, Inc.*, 962 F.2d 978 (10 Cir. 1992), plaintiff MAI brought suit in Federal District Court against defendant Basis, et al. Basis moved for a preliminary injunction restraining MAI from filing any suits against third parties relating to the dispute between MAI and Basis. The injunction was granted and MAI appealed. The Tenth Circuit found that where a preliminary injunction has been issued that affects the right to file other lawsuits, an interlocutory appeal is appropriate. *Id.* at 982-83. Similarly, in *Katz v. Lear Sieglar, Inc.*, 909 F.2d 1459 (D.C. Cir. 1990), an interlocutory appeal was allowed because a federal court had issued an injunction against continuing suit in another forum. *Id.* at 1461.

In all of these suits, the interlocutory appeal was allowed under 28 U.S.C. § 1292(a) for the reason that a federal court had issued an injunction prohibiting parties

from proceeding to litigate related disputes in federal or state court. These holdings provide no support for petitioners where, as here, the only issue presented is that petitioners utilized the Washington statutory remedy of filing a *lis pendens* notice in the county recorder's office and were directed not to do so because it was without merit. The District Court's order prohibiting them from doing so without further leave of the court is not comparable to a prohibition on proceeding in other courts.

Petitioners cite *Exxon Mobile Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 294, n. 9 (2005) for the proposition that parallel state and federal litigation is part of the American legal system. Petition at 20. Petitioners cannot, of course, complain that Judge Zilly has in any way prohibited them from proceeding in their litigation in state court. Instead, their grievance is only that he determined a statutory notice remedy available under state law was improper and should not be utilized. Petitioners' attempt to magnify this narrow ruling into a global prohibition on pursuing their claims in state court is unsupportable.

D. The *Rooker-Feldman* Doctrine and the *Younger* Abstention Doctrine Do Not Apply to the Appeal Relating to These Respondents.

Petitioners raise arguments relating to the *Rooker-Feldman* Doctrine and *Younger* Abstention Doctrine, decisions which the Ninth Circuit applied in the petitioners' case against the judges of the trial and appellate courts of the State of Washington. Pet. App. at A4. As it has nothing to do with these respondents, no response is offered.

IV. CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

DATED this 12th day of April, 2006.

Respectfully submitted,

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(3)

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No. 05-991

IN THE
Supreme Court of the United States

Viveca Sanai, Cyrus Sanai, and Fredric Sanai,

Petitioners,

v.

Sassan Sanai, et. al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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No. 05-991
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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondents Sassan Sanai, Internal Medicine & Cardiology Inc., Mary McCullough, William Sullivan, and Marsh, Mundorf, Pratt, Sullivan & McKenzie (collectively, the "Sassan Parties") have addressed two of the four issues presented to this Court. The state court judicial officials sued by Petitioners (including Philip Maxeiner, Sassan Sanai's accountant who was appointed as a judicial referee by the other judical defendants) have not filed an opposition and have not filed any notice of non-opposition. Petitioners will address new authority that is relevant to the claims against the state judicial officers before addressing the points raised by the Sassan Parties.

I. There is a Three-Way Circuit Circuit Split as to Whether the *Rooker-Feldman* Doctrine Applies to Ongoing State Court Proceedings.

Petitioners' third question presented a split between the First and Ninth Circuits' application of this Court's recent opinion on the *Rooker-Feldman* doctrine, *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005). In *Exxon Mobil*, this Court held that the *Rooker-Feldman* doctrine does not apply to state court actions which are ongoing, but the circuit courts cannot agree when a state proceeding has ended for purposes of *Rooker-Feldman*. What was a two-way split is now a three-way split. In *Guttman v. Khalsa*, 03-2244 (10th Cir. 2006), the Tenth Circuit held, after this Court granted a petition of certiorari and remand based on *Exxon Mobil*, that the *Rooker-Feldman* doctrine does not bar a federal suit which would affect an ongoing state action, whether in the trial or appellate stage. *See Guttman v. Khalsa*, 126 S. Ct. 321 (2005). The Eighth Circuit took the same position in *Dornheim v. Sholes*, 430 F.3d 919, 923-924 (8th Cir. 2005). These holdings conflict with the Ninth Circuit's holding, invoked in this case, that *Rooker-Feldman* bars federal suits that may affect ongoing state court proceedings if the state high court has resolved, or declined to address, a single constitutional issue on an interlocutory basis. *Mothershed v. Justices of the Supreme Court*, 410 F.3d 602 (9th Cir. 2005). The First Circuit took a third tack, ruling that *Rooker-Feldman* applies to ongoing state court proceedings only if all federal issues have been resolved at the highest possible state court level and thus opening up the possibility of certiorari review by this Court.

Federacion de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico, 410 F.3d 17 (1st Cir. 2005).

The First, Eight, Ninth and Tenth Circuits have now adopted every possible logical permutation of this oft-recurring question. This Court should grant review to resolve this ever-widening circuit split.

II. The Proposed Alternative Questions Presented are Misleading and Incomplete

The Sassan Parties propose two questions presented which are misleading and incomplete.

The first question proffered by the Sassan Parties is whether the Ninth Circuit is "in substantial conformity with the other federal circuits in determining that the collateral bar doctrine does not allow review of the contempt order where that order was for civil rather than criminal contempt." Sassan Parties Brief at 1. In fact, the Ninth Circuit's published authority holds the opposite: "The collateral bar rule applies only to criminal contempt charges. The invalidity of the underlying order is always a defense to a civil contempt charge." *In re Establishment Inspection of Hern Iron Works, Inc.*, 881 F.2d 722, 726, fn. 11 (9th Cir. 1989), *citing United States v. United Mine Workers*, 330 U.S. 258 (1947). Indeed, every Circuit follows this Court's decision in *United Mine Workers,* so there is not a single example of any circuit court applying the collateral bar doctrine to a civil contempt order.

The Sassan Parties also contend that the second issue before this Court is whether the May 15, 2003 orders are appealable or not. That is not correct.

This second issue before this Court is the appealability of the orders issued by the trial court on September 26, 2003 which (1) barred the Petitioners from filing additional lis pendens and (2) canceled a lis pendens filed in respect of a state court action. The September 26, 2003 orders were a modification of the May 15, 2003 orders absolutely barring any "interference" in the judicial activities assigned to Sassan's accountant, Philip Maxeiner, and canceling a lis pendens filed in respect of the federal court action.

28 U.S.C. §1292(a)(1) provides that the Court of Appeal has jurisdiction over orders which modify prior injunctions and other orders deemed to be injunctions under 28 U.S.C. §1292(a)(1). Similarly, orders which modify final judgments or orders are themselves appealable as final orders. While the orders subject to one of the appeals at issue in this petition are the September 26, 2003 orders, those orders would be appealable if the May 15, 2003 order canceling a lis pendens and barring any "interference" in the sale by judicial referee Philip Maxeiner of two properties in the divorce between Petitioner Viveca and Respondent Sassan were also appealable; but it is not the case that if the May 15, 2003 orders were unappealable, that the September 26, 2003 orders must be unappealable as the latter were inextricably bound to a criminal contempt conviction.

III. The Trial Court's Order to Pay $2,500 to it was a Criminal Contempt Order.

In 1994, this Court directly addressed the question of what constitutes a civil versus a criminal

contempt, and the constitutional protections required for each kind of proceeding. This Court wrote that:

> This dichotomy between coercive and punitive imprisonment has been extended to the fine context. A contempt fine accordingly is considered civil and remedial if it either "coerce[s] the defendant into compliance with the court's order, [or] . . . compensate[s] the complainant for losses sustained." *United States v. Mine Workers,* 330 U.S. 258, 303-304 (1947). Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge. *See Penfield Co. of Cal. v. SEC,* 330 U.S. 585 (1947). Thus, a "flat, unconditional fine" totaling even as little as $50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance. Id., at 588.

International Union, United Mine Workers of America, v. Bagwell, 512 U.S. 821, 829 (1993)

In this case the trial court imposed a "flat, unconditional fine" totaling $2,500, payable to the trial court, and there was no subsequent opportunity to reduce or avoid the fine through compliance. The Ninth Circuit followed this Court's analysis on this issue and found that the fine was a criminal contempt penalty. The Sassan Parties' brief quotes a different section of *Bagwell,* at page 833 (mis-cited in

the brief as page 823), to argue that the fine was civil. However, they are confused. The issue under discussion in that portion of the opinion concerns what "further procedural protections are afforded for contempts occurring out of court, where the considerations justifying expedited procedures do not pertain." *Bagwell,* 512 U.S. at 833. The question of whether the contempt should have been adjudicated through a full criminal trial is not before this Court.

Moreover, as noted by the Sassan Parties, a civil contempt order is not directly appealable. *See* Sassan Parties Brief at 4. Accordingly, if the Ninth Circuit had found that the September 26, 2003 order to pay a $2,500 fine was a civil contempt sanction, it would have declined to review the September 26, 2003 order in any respect. The Ninth Circuit's memorandum order lists, in Section 1 of the order, all of the trial court orders which it found were not appealable. *See* Cert Pet. App. A2-A3. The September 26, 2003 order to pay a $2,500 fine to the trial court is absent from the list of non-reviewable orders. Instead, the Ninth Circuit applied its long standing precedent concerning the collateral bar rule, *Hern*, to hold that Petitioners could not challenge the merits of the May 15, 2003 "cease and desist" order in its appeal of the criminal contempt order. "The collateral bar rule applies only to criminal contempt charges. The invalidity of the underlying order is always a defense to a civil contempt charge." *Hern,* 881 F.2d at 726, fn. 11, *citing United Mine Workers,* 330 U.S. at 295. This text is set forth in footnote 11 of *Hern*; this footnote was conveniently omitted by the Sassan Parties in their misleading quotation from this opinion. *See*

Sassan Parties Brief at 5-6 (omitting footnote 11). The application by the Ninth Circuit of the collateral bar rule to the order under review necessarily means that the Ninth Circuit found the order to be a criminal contempt order. If the Ninth Circuit had found it to be a civil contempt order, then under *Hern* and this Court's decision in *United Mine Workers* (cited in *Hern*) the collateral bar rule could not apply.

Sassan's argument for denying review of the first question rests almost entirely on the misconception that the collateral bar rule applies to a civil contempt order. *See* Sassan Parties Brief at 6. This contention is meritless, given footnote 11 of *Hern*. The remainder of the arguments suggest fake distinctions between the order at issue here and the orders at issue in published precedent. In *Walker v. City of Birmingham,* 388 U.S. 307, 319 (1967), this Court expressly conditioned the application of the collateral bar rule in criminal contempt cases to the availability of "an expedited process of appellate review" of the order. This holding was reiterated in *United States v. Ryan*, 402 U.S. 530, 532 n.4 (1971), where this Court wrote that "*Walker v. Birmingham*, 388 U.S. 307 (1967), is not to the contrary. Our holding that the claims there sought to be asserted were not open on review of petitioners' contempt convictions was based upon the availability of review of those claims at an earlier stage." The Sassan Parties' response to this obvious conflict between *Walker* and *Ryan*, on the one hand, and *Hern* and this case on the other, is to argue that because the criminal contempt orders arose from violation of a different kind of order than at issue here, that the

prerequisite of prior appellate review is not applicable. This happens to be the analysis in *Hern*. However, there is zero authority to support this contention, other than *Hern* itself. Every other appellate court to consider the matter, including this Court, has held that an opportunity for prior appellate review is an absolute precondition to application of the collateral bar doctrine, no matter what the reason for its imposition. Accordingly, this Court should resolve the conflict between the Ninth Circuit's view on this issue, and the precedent of this Court and every other court to have addressed the matter.

IV. Under the Majority View, Orders Barring Exercise of a State Court Remedy or Canceling a Lis Pendens are Appealable.

The Sassan Parties do not dispute, let alone address, the inter-circuit conflict between the view assumed by the Third Circuit and now the Ninth Circuit concerning the appealability of orders which restrict or bar a party from seeking a remedy in state court. Instead, they argue that even under the majority view, the May 15, 2003 orders and the September 26, 2003 order modifying the May 15, 2003 orders, which canceled a lis pendens and barred Petitioners from filing a lis pendens in state court or taking any other action to interfere with Philip Maxeiner's exercise of his judicial duties, would not be directly appealable.

This contention is directly contradicted by the Eighth Circuit's decision in *S.B. McLaughlin & Co. v. Tudor Oaks Condominium Project*, 877 F.2d 707, 709 (8th Cir. 1989), where the Eighth Circuit ruled

that an order barring a party from filing a lis pendens is a preliminary injunction, and further held that "[c]ancellation of a notice of lis pendens [is] appealable under the collateral order exception to the final judgment rule". In doing so the Eighth Circuit cited its prior decision in *Keith v. Bratton*, 738 F.2d 314, 316 (8th Cir. 1984), which also held that an order canceling a lis pendens is directly appealable. Both of these decisions were made after *Carson v. Am. Brands, Inc.*, 450 U.S. 79 (1981). Likewise, the Seventh Circuit has held that an order canceling a lis pendens is directly appealable, stating that "in our view the lis pendens issue is substantially separate from the basic issue presented in the complaint and the judgment is final under 28 U.S.C. §1291." *Suess v. Stapp*, 407 F.2d 662, 663 (7th Cir. 1969). The Ninth Circuit, of course, does not agree with the view that an order canceling or prohibiting a notice of lis pendens is directly appealable. *See Orange Cty., California Airport Assoc. v. Hongkong and Shanghai Banking Corp.*, 2 F.3d 821 (9th Cir. 1995).

Therefore it is absolutely clear that under the specific holdings of the Eighth and Seventh Circuits, an order canceling a lis pendens and prohibiting filing of future lis pendens would be appealable under 28 U.S.C. §1291 or the collateral order doctrine, while under the Ninth Circuit's precedent, such an order is not appealable. Under the interpretation of this Court's decision in *Carson* employed by the Third and Ninth Circuits, any order which did not grant relief requested by the moving party in its complaint would not be appealable under 28 U.S.C. §1291 or the collateral order doctrine. The

approach of the Third Circuit. *AmSouth Bank v. Dale,* 386 F.3d 763, 772-774 (6th Cir. 2004); *MAI Basic Four, Inc. v. Basis, Inc.,* 962 F.2d 978, 981-3 (10th Cir. 1992). Since this Court's decision in *Carson,* the Second, Fifth, Seventh and Federal Circuit have also allowed appeals from district court orders which prohibit or restrict the use of state court remedies, whether or not such relief is requested by the moving party in its complaint. *See HBE Leasing Corp v. Frank,* 48 F.3d 623, 632 n.6 (2d Cir. 1995); *Phillips v. Chas. Schreiner Bank,* 894 F.2d 127, 130 (5th Cir. 1990); *Asset Allocation & Mgmt. Co. v. W. Employers Ins. Co.,* 892 F.2d 566, 568 (7th Cir. 1989); *Katz v. Lear Siegler, Inc.,* 909 F.2d 1459, 1461 (Fed. Cir. 1989).

V. Basis for Jurisdiction

Respondent argues that the correct basis for jurisdiction by this Court over the Ninth Circuit's judgment is 28 U.S.C. §1254(a). Petitioners have no objection to this assertion of this Court's basis of jurisdiction.

CONCLUSION

The petition for certiorari should be granted for the reasons stated in the petition and in this reply.

Respectfully submitted this April 20, 2006 by:

Cyrus Sanai

Vivera Sanai